Supreme Court, U.S.
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No. _____

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In The

Supreme Court of the United States

October Term, 1994

THEODORE B. GOULD,

Petitioner,

v.

FRED STANTON SMITH, as Trustee of the MIAMI CENTER LIQUIDATING TRUST, and UNITED STATES OF AMERICA,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a final judgment ordering payment of a $1,331,000 noncompensatory contempt fine to the United States, which is not purgable, imposed for failure to comply with a civil contempt order to turn over the proceeds of the sale of certain personal property, in the amount of $66,500 to a trustee who was appointed under the provisions of a reorganization plan, the confirmation of which has been reversed, violates the procedural requirements of due process of law for imposition of a criminal contempt fine.

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Theodore B. Gould, *pro se,* respectfully petitions for a writ of certiorari to review the failure of the United States Court of Appeals for the Eleventh Circuit to restrict Judge Stanley Marcus of the United States District Court for the Southern District of Florida to the lawful exercise, in accordance with 18 U.S.C. Section 401, of a court's civil contempt power in this case.

OPINIONS OF OTHER COURTS

The *per curiam* judgment of the court of appeals (App. 2) is unreported. The memorandum opinion and order of final judgment of the district court (App. 7-18) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 1994 (App. 1-2), and a timely suggestion of rehearing *en banc* (which is treated by the Eleventh Circuit as a petition for rehearing, 11th Cir. R. 35-6) was denied on January 17, 1995 (App. 3-4). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 401 of Title 18, United States Code, Crimes and Criminal Procedure, provides:

> 18 U.S.C. Section 401. Power of Court.
>
> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as –
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

STATEMENT

1. *The Bank Of New York's Plan, The Conduct Of The Miami Center Liquidating Trust's Trustee, And The District Court's Exercise Of Its Contempt Power.* – This case concerns a court's imposition of a noncompensatory contempt fine as a final judgment payable to the United States of America, in the amount of $1,331,000, plus interest, for the petitioner's failure to comply with a bankruptcy court's order to turn over the proceeds of the sale of certain personal property, in the amount of $66,500, to respondent Fred Stanton Smith in his capacity as a trustee appointed under the provisions of an erroneously confirmed plan of reorganization proposed by the Bank of New York, the confirmation of which has been reversed, *In re Holywell Corporation (Bank of New York v. Olympia & York Florida Equity Corp., Theodore B. Gould, and Miami Center Joint Venture)*, 913 F.2d 873 (11th Cir. 1990).

The history of the proceedings which have resulted in this appeal of the Eleventh Circuit's affirmance of the district court's exercise of its contempt power has already been set forth in an opinion of this Court, cited as *Holywell Corporation, et al. v. Smith*, 503 U.S. 47, 112 S.Ct. 1021, 117 L.Ed. 196 (1992).

This specific case was commenced in the United States Bankruptcy Court for the Southern District of Florida, when the trustee filed a motion for contempt on June

8, 1989, App. 19, alleging that ownership of certain personal property of the individual debtor's bankruptcy estate had been transferred after confirmation to respondent Smith as the trustee of the Miami Center Liquidating Trust ("liquidating trust"), under the provisions of the Bank's plan, see *In re Holywell Corp.*, 54 B.R. 41 (Bkrtcy. S.D. Fla. 1985),[1] and that the proceeds of the property's sale should be turned over to the trustee.

During the hearing on the trustee's contempt motion, the following colloquy occurred in the bankruptcy judge's presence:

> MR. STETTIN:[2] The Debtor, after discharge, knowingly and willfully sold that property knowing that the trust wanted the . . . [sale] proceeds . . . and he refused to turn it over. . . . [A]nd he has announced in advance that he will not abide your order because you have made a ruling on the income tax decision which he considers to be null and void.[3]

---

[1] The original presiding bankruptcy judge was later required to recuse himself, *infra* at 12, n. 9.

[2] Herbert Stettin, Esq., the Bank's expert witness was appointed as the trustee's attorney on May 27, 1987, and advised Mr. Smith that under the provisions of the Bank's plan, the trustee was relieved of the statutory obligation to pay taxes as a fiduciary on the income attributable to the property in his custody. Compare *In re Holywell Corp.*, 911 F.2d 1539, 1547 (11th Cir. 1990) (Cox, J., Dissent) ["The Plan authorizes the liquidating trustee not only to liquidate the debtor's property but also to manage the property 'in all other ways as would be lawful for any person owning the same to deal therewith. . . . ' Article V, paragraph 3."; also *Holywell*, 112 S.Ct. at 1024.

[3] See *In re Holywell Corp.*, 85 B.R. 898 (Bkrtcy. S.D. Fla., 1988).

MR. GOULD: The $67,500 represents . . . taxable . . . income for the year 1989. . . . You have reached the decision that the trustee is not responsible for the payment of federal and state income taxes. . . .

What Mr. Stettin is asking me to do and what you would be asking me to do is to turn over these assets and then not have the funds to pay statutory tax liabilities. . . . Now there is no question that the [liquidating] trust was created for the purpose of avoiding the payment of taxes. . . .

I have the responsibility, if the trustee does not, to file the returns. If I file the return . . . I have to pay the taxes. . . .

If somebody can explain to me how I can turn the funds over and be discharged of any tax liability and any responsibility to file the return for 1989, I would be very happy to do that. So far, nobody has done that. All they have done is say: "Give me the asset; we are not responsible for the [tax] liabilities associated with it, just give me the assets." I think there is something wrong with that and I am afraid I cannot do that.[4]

MR. STETTIN: Mr. Gould was saying[5] that he is concerned that if he pays the money over, he moots any appeal that he might have from that order, once he's complied with it.

THE COURT: Read me the colloquy again. . . .

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[4] Bkrtcy. S.D. Fla., *Transcript*, July 27, 1989, p. 67-8; see *In re Holywell*, 911 F.2d 1539 at 1545 ["the reorganized debtor, not the liquidating trustee, is responsible for such taxes"].

[5] *Id.*, p. 71, quoting Deposition of Theodore Gould, July 19, 1989, pp. 10-11.

MR. STETTIN: The question:

> "Q: If . . . ordered by the Court to turn it over, will you turn it over?
>
> A: No. If ordered by the Court to turn it over or a sanction is imposed upon me for not turning it over, I will not turn it over because . . . [the Bank's attorneys] and perhaps you too or maybe even the Court would then moot or demand that the Court to which . . . I appeal Judge Weaver's decision moot the appeal and the court above would have to do that on the grounds that it lacked jurisdiction since there would be no dispute [or] controversy.

On August 1, 1989, the bankruptcy court entered a contempt order, drafted by the trustee's attorney, imposing a daily coercive fine of $1,000 in the event that the net sale proceeds of $66,500 plus interest were not turned over by August 4, 1989. Bankruptcy Judge Weaver certified the contempt to the district court and held:

> The Court . . . finds and determines this certification is for a contempt committed both under Rule 9020(a) and (b), or the Rules of Bankruptcy Procedure in that THEODORE B. GOULD was in the presence of the Court and was ordered to comply by the court on July 27, 1989, and has announced his intention not to do so. App. 27.

During the appellate proceedings before the district court, the following pertinent colloquy occurred:

> THE COURT: Tell me why we should not enter a simple clear and unequivocal order directing you to disgorge and turn it over within a time period, and if you fail to do that, why the right remedy isn't simply to do what Mr. Stettin has

> said, which would be to incarcerate you until and unless you comply with this order.
>
> MR. GOULD: Let me explain very simply that . . . I consider the Court's use of the contempt [power] to be a very serious matter. $66,000 is a small amount of money. I did not put myself in this position to resolve a trivial matter. It is clear that, as the First Circuit held, . . . once a civil contempt order is complied with, no case or controversy remains. . . . *In re Cordova Gonzalez*, 726 F.2d 16 (1st Cir. 1984). The case would be moot if I turn the funds over.
>
> THE COURT: Have you?
>
> MR. GOULD: No. I haven't turned the funds over and I do not intend to.[6]

On May 17, 1991, a contempt order was entered by the district judge directing that within seven days the net sale proceeds be turned over to the trustee, subject to the imposition of sanctions "including but not limited to a daily fine in the amount of $1,000," App. 36, based on the following analysis of the proceedings below:

> Under the bankruptcy court's August 1, 1989 Order Finding Theodore B. Gould In Contempt, Mr. Gould was required to turn over net proceeds from the sale of trust property. If Mr. Gould failed to comply by August 4, 1989, a $1000/day fine was to be imposed until the proceeds were turned over. The bankruptcy court further found Mr. Gould to be in violation of its Order and concluded that Mr. Gould

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[6] S. D. Fla., *Theodore B. Gould v. Smith*, Transcript, December 14, 1990.

> should also be punished by a period of incarceration not to exceed ten (10) days. Moreover, *the bankruptcy court concluded that Mr. Gould was found to be in criminal contempt* in that Mr. Gould's failure to comply with the court's orders was done in the presence of the court, and that Gould announced his intention not to comply. (Emphasis added) App. 33.

The district judge's analysis of whether the failure to comply with the bankruptcy court's order was a criminal contempt was as follows:

> The Supreme Court has said that the words used by the lower court to describe the contempt are not determinative. *Shillitani v. United States*, 384 U.S. 364, 369, 86 S.Ct. 1531, 1535 L.Ed. 2d 622 (1966). The same actions by a party can amount to both civil and criminal contempt. *United States v. United Mine Workers*, 330 U.S. 258, 299, 67 S.Ct. 677, 698-99, 91 L.Ed. 884 (1947). It is the nature and purpose of the punishment that is determinative. *Id.* at 297, n. 64 (citations omitted), *Hicks v. Feiock*, 108 S.Ct. 1424, 1429-31 (1988). *The commonly stated distinction is that "if the penalty is to compensate the complaining party or to coerce the defendant into complying with the court's orders, the contempt is civil, while if the penalty is punitive, intended to vindicate the authority of the court, then the contempt is criminal. Hubbard v. Fleet Mortgage Co.*, 810 F.2d 778, 781-82 (8th Cir. 1987), citing *United Mine Workers*, 330 U.S. at 302-04. See also *Latrobe Steel Co. v. United Steelworkers of America*, 545 F.2d 1336, 1343 (3rd Cir. 1976). As a result, "*the penalties arising out of adjudications of criminal contempt are generally an absolute fine of a specific amount* or determinative period of confinement." *Id.* (Emphasis added)

> While *the bankruptcy court found Mr. Gould to be in criminal contempt,* it appeared to intend a coercive as well as a punitive sanction. (Emphasis added) While we adopt the Bankruptcy Court's findings we now find Theodore B. Gould to be in *civil* contempt of court [internal f.n. 6] (original emphasis) See *Shillitani,* 86 S.Ct. at 1535 (parties had briefed the issues with reference to criminal contempt, but "the contempt orders were remedial, and therefore might well be deemed civil in nature rather than criminal.")
>
> ---
>
> [6] We take no position *at this time* on the merits of a criminal contempt finding with respect to Mr. Gould. (original emphasis) App. 36.

The court of appeals affirmed without a written opinion, *Gould v. Smith, as Trustee,* 968 F.2d 24 (1992), a petition for writ of certiorari was denied, 113 S.Ct. 1261 (1993).[7] Thereafter, the district court entered a "[f]inal judgment in favor of the United States of America and against Theodore B. Gould . . . in the amount of $1,331,000," App. 18. The court calculated the penalty from August 1, 1989, through March 24, 1993, "for failure to comply with the orders of the Bankruptcy Court and this Court to turn over the proceeds from the sale of the concrete pumps," App. 18, and concluded that "the

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[7] The principal question presented in the petition for writ of certiorari was "whether the invalidity of the creation of a liquidating trust for the fraudulent purpose of the avoidance of taxes and the bankruptcy court's appointment of a receiver under a confirmed plan's provisions may be shown in a collateral proceeding."

United States can execute upon [the judgment] should Gould ever acquire reachable assets," App. 14.

A notice of appeal was timely filed on the grounds, *inter alia*, that the district court's final judgment imposing a serious and noncompensatory contempt fine payable to the United States, in the amount of $1,331,000 plus interest, for the failure to comply with the court's orders was necessarily a punitive sanction to vindicate the court's authority and accordingly constituted a criminal fine imposed in violation of the procedural requirements of due process of law as applicable to criminal contempt cases.

The United States did not file a brief and withdrew its notice of appearance, App. 105. Instead, the United States Attorney for the Southern District of Florida informed the clerk of the court of appeals that "[t]he United States, which is not a party, has been asked to assist in this case in the collection of a civil contempt fine. . . . Since the United States is not involved in the issues raised on appeal, we will not be filing a brief with the Court," App. 105.

While these proceedings were pending before the court of appeals, the bankruptcy court awarded $70,000[8] to me as reimbursement of accounting expenses incurred to segregate the trustee's commingled accounting of the

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[8] The application for reimbursement of accounting expenses had sought $1,859,835, incurred during a period commencing on January 2, 1987. The attorneys' fees and accounting expenses of defeating the scheme of the Bank has exceeded $4.1 million, of which $1.6 million remains unpaid; compare *infra* at 14, n. 10.

income attributable to the property of the separate taxable entities held in his fiduciary custody, App. 65. The bankruptcy court's judgment, which was drafted by the attorneys for the trustee and the Bank, required the use of these funds to pay the district court's compensatory fine of $66,500 plus interest, payable to the trustee, App. 66.

A notice of supplemental authority, filed in the court of appeals on July 7, 1994, relied on this Court's opinion, in *International Union, United Mine Workers of America v. Bagwell, et al.*, 114 S.Ct. 2552 (1994), to support the argument that the district court's noncompensatory contempt fine entered as a final judgment payable to the United States, in the amount of $1,331,000, plus interest from March 25, 1993, was a punitive sanction imposed as a criminal contempt fine to vindicate the Court's authority and accordingly violated the procedural requirements of due process of law applicable to criminal contempt. App. 44. Nevertheless, the court of appeals affirmed, in an opinion which failed to consider the limitations imposed by *International Union, UMWA v. Bagwell* on the exercise of the judicial contempt power.

As to the question of whether the final judgment payable to the United States, for the failure to turn over $66,500 to the trustee appointed under the provisions of the Bank's erroneously confirmed plan, was a punitive sanction imposed as a criminal contempt fine to vindicate the court's authority, in violation of due process of law, the court of appeals held:

> Gould's challenges regarding the legality of the order to turn over proceeds and the contempt power have already been presented to this

Court and found without merit, and are, therefore, barred. App. 2.

A suggestion of rehearing *en banc* was filed presenting the question of whether the district court's noncompensatory contempt fine payable as a final judgment to the United States, was a punitive sanction imposed to vindicate the court's authority, in conflict with this Court's *International Union, UMWA v. Bagwell* opinion.

The court of appeals was also informed that, upon the motion of the United States, the district court had entered an order directing that the proceeds of a reward granted to me by the Internal Revenue Service, see 26 U.S.C. Section 7623, for the accounting information which caused the defeat of the fraudulent scheme of the Bank and the trustee to evade the payment of income taxes attributable to the property of Holywell Corporation & Subsidiaries be placed in the court registry, App. 111. Nevertheless, the court of appeals denied the suggestion of rehearing en banc without filing an opinion, App. 3.

2. *The Facts* – It is undisputed that I refused to comply with the turnover orders of the courts below for the following reasons:

The Bank's plan was confirmed without a confirmation hearing being held as required by 11 U.S.C. Section 1128(a), and the presiding judge was later required to recuse himself from this case for pervasive personal bias expressed against me in an *ex parte* conference held on May 15, 1987.[9]

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[9] The bankruptcy judge made the following pertinent statement with respect to your petitioner, which illustrates the

The trustee knew that the Bank's amended plan did not comply with the provisions of 11 U.S.C. Section 1129. Nevertheless, instead of seeking the court's instructions concerning the distribution of the property in his fiduciary custody, after notice to interested parties, the trustee conspired with the Bank to cause substantial consummation of the Bank's plan and the dismissal of the debtors' appeal of the order confirming the Bank's plan as "moot," subject to the Bank's indemnification to hold him personally harmless for his actions, App. 49.

The Bank's plan transferred control of all the property of my estate to the trustee, *Holywell*, 112 S.Ct. at 1026, and also provided for the transfer to the trustee, as an assignee, of "all or substantially all" of the property of Holywell Corporation, and of its nondebtor subsidiaries, none of which were before the court, 112 S.Ct. at 1025. The total net value of my estate originally placed in the

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degree to which these proceedings departed from the appropriate judicial standard:

> There are some people that there is absolutely no doing business with, you simply roll over them or they roll over you, and Gould, in my mind, falls in that category . . . that man has to be blasted out of the way. . . . [O]ne great strength that the Bankruptcy Court has . . . is that if an order of this Court is not superseded and that order is performed, then it cannot be challenged any further . . . and if we had been able to carry out the entire plan very quickly, there would have never been an appeal because they couldn't post the [$140 million] bond," [Bkrtcy. S.D. Fla., Transcript, *Ex Parte* Conference, Bankruptcy Judge Thomas C. Britton, May 15, 1987, pp. 31-33]

trustee's hands on October 10, 1985, exceeded $150 million.[10]

The trustee then sought declaratory relief against the United States, Holywell Corporation, and me from the bankruptcy court on December 27, 1987, in response to various lawsuits which I caused to be filed against the trustee and the Bank, alleging breach of fiduciary duty for his failure as an assignee to establish a reserve for the payment of the federal and state taxes incurred on the income attributable to the transfer of the[11] property of Holywell and its nondebtor subsidiaries; the trustee alleged that he was merely "a disbursement agent

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[10] As of January 31, 1995, the trustee had collected $58,211,947.63 in cash, had disbursed $55,877,446.13, including attorneys' fees and accounting expenses in the amount of $8,405,071.64 paid as administrative expenses, plus interest for the period during which the courts below had stayed the trustee's disbursement of funds prior to the issuance of this Court's *Holywell* opinion, and had failed to collect or had conveyed without consideration to the Bank's nominee property the value of which exceeded $90 million on the effective date of the Bank's plan.

[11] Holywell Corporation, Robert M. Musselman, Esq., and your petitioner were later held in contempt of court, because I refused to cause the dismissal of these lawsuits, App. 65; compare *Beaston v. Farmers' Bank*, 37 U.S. (12 Pet.) 102, 133-34 (1838) [whenever a debtor is divested of his property, "the person who becomes invested with the title, is thereby made a trustee for the United States, and is bound to pay their debt first out of the proceeds of the debtor's property"], quoted and paraphrased in *Bramwell v. United States Fidelity & Guaranty Co.*, 269 U.S. 483, 488 (1926) and *King v. United States*, 379 U.S. 329, 336-38 (1964); see 31 U.S.C. Section 3713(b); also 26 U.S.C. Section 6901.

[rather] than an assignee or fiduciary," *In re Holywell Corp.*, 911 F.2d at 1545.

Under the provisions of the Bank's plan, the trustee had authority to execute and deliver the contract of sale and special warranty deed required to effect the transfer of the concrete pumps to the purchaser, see Art. V, 3(d); *Holywell*, 112 S.Ct. at 1024; compare, App. 21. However, in the adversary proceedings initiated by the trustee for declaratory relief from the statutory obligations governing the conduct of fiduciaries for the payment of taxes attributable to the income derived from the sale of property in the trustee's possession, Mr. Smith testified as follows:

> MR. STETTIN: " . . . do you have any other control of any other property other than money of any of the consolidated debtors?"
>
> MR. SMITH: "No, I do not."
>
> . . .
>
> MR. STETTIN: "Have you done anything except hold title to the money and determined the validity, priority and amount of the claims against the consolidated debtors?"
>
> MR. SMITH: "That's all I have done."

Bkrtcy. S.D. Fla., *Transcript*, February 11, 1988, p. 87; compare, supra at 4.

The Trustee's attorney drafted the bankruptcy court's findings of fact and conclusions of law, *In re Holywell Corp.*, 85 B.R. 898 (Bkrtcy. S.D. Fla., 1988), which held, in relevant part:

> The liquidating trustee and the trust are . . . not liable for any taxes that may be due and owing

> to the government because the trust is a grantor trust and . . . [h]ere the debtors are the grantors of the trust, pursuant to the [Bank's] confirmed plan. 85 B.R. at 902.
>
> The payment of the federal taxes would, of necessity, be an impermissible modification of the confirmed plan. . . . The relief sought by the debtors and the government would require the complete dismantling of the substantially consummated plan. . . . *Id.* at 903.

The Eleventh Circuit has relied on its "Miami Center" mootness doctrine, *Miami Center Limited Partnership v. Bank of New York,* 838 F.2d 1547 (11th Cir. 1988), *cert. denied,* 488 U.S. 823 (1988), based on the trustee's commencement of distribution under the provisions of the Bank's plan to cause the plan's substantial consummation in accordance with 11 U.S.C. Section 1101(2), after the Bank agreed to indemnify him and hold him personally harmless for his actions under the plan's provisions, for the purpose of denying redress to the debtors in a trial on the merits of the Bank's fraud and breach of contract,[12] *Ibid.* at 1549 ["The approved reorganization plan provided that this case . . . was a chose in action . . . under the control of the trustee [and] was to be dismissed by the trustee"]; also *Holywell,* 911 F.2d at 1543 ["the allegation

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[12] It is undisputed that the Bank funded its borrower Miami Center Limited Partnership's net payroll, refused to issue non-disturbance agreements in violation of the mortgage documents, charged interest in excess of the amount due under the Notes, and refused to sell its notes and mortgages in accordance with the requirements of certain tri-partite buy-sell agreements with the Miami Center's permanent lenders.

of fraud is an attempt to modify or alter the Plan and is therefore barred under the mootness doctrine"].

The Eleventh Circuit has also sanctioned the trustee's breach of fiduciary duty, see *In re Holywell Corp*, 93 B.R. 780 (S.D. Fla. 1988, *aff'd* 881 F.2d 1086 (11th Cir., *cert. denied* 493 U.S. 1057 (1990) [The district court had held that the trustee's failure to discharge his statutory obligation to pay income taxes was not a breach of fiduciary duty because "the allegations of misconduct refer . . . to the duties that were required for the Confirmed Plan of Reorganization," 93 B.R. at 783].[13]

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[13] A motion has been filed under Rule 60(b)(5) of the Federal Rules of Civil Procedure for relief from the bankruptcy court's judgment that the trustee's failure to discharge laws governing the conduct of fiduciaries for the payment of taxes was not a breach of fiduciary duty and negligence. The bankruptcy court denied the motion for relief and the district court adopted the bankruptcy judge's conclusion of law, drafted by the trustee's attorney, "that [t]he Supreme Court's tax decision has not changed the result of the debtors' prior unsuccessful attacks on the Trustee . . . [since] no credible evidence . . . showed the Trustee knew or, under the circumstances, should have known that he was responsible for the taxes prior to the Supreme Court's ruling," *Smith v. United States, Holywell, Theodore B. Gould, and Bank of New York*, No. 87-0627-BKC-SMW-A (remand), September 30, 1993 (Bkrtcy. S.D. Fla.), and concluded as follows:

> The Supreme Court decision was limited to the issue of the Trustee's responsibility to file tax returns and pay federal taxes. The Court held that the failure of a plan of reorganization to provide for the taxes did not bind federal tax authorities. This decision does not affect the issues raised in the complaint, *Holywell Corporation, et al. v. Bank of New York, et al.*, No. 93-0942-Civ-Moore, May 19, 1994.

An appeal of this decision to the Eleventh Circuit is pending.

After the Eleventh Circuit held in a second appeal of the confirmation order that the Bank's amended plan did not comply with the provisions of the Bankruptcy Code, see *In re Holywell Corp. (Bank of New York v. Olympia & York Florida Equity Corp., Theodore B. Gould, and Miami Center Joint Venture)*, 913 F.2d 873, 880 (11th Cir. 1990) and also held that the bankruptcy court lacked authority to confirm the Bank's Plan, *Id.*, and accordingly affirmed the reversal of the order confirming the Bank's amended Plan, I used the funds, which the courts below had ordered turned over to the trustee, to pay Arnold & Porter's for filing a petition for a writ of certiorari of the judgment of the court of appeals in the tax case, cited as *In re Holywell Corp.*, 911 F.2d 1539 (11th Cir. 1990), and to force the trustee to comply with the law and the provisions of the Bank's plan, supra at 4, n.2.

There was no alternative source of funds to pay attorneys' fees, because the bankruptcy court had held that, under the provisions of the Bank's plan, only the trustee could employ professionals, App. 62, 86, 90, and also concluded that my filing the appeal to this Court was a breach of fiduciary duty under the provisions of the Bank's plan, App. 75, n.2. Nevertheless, this Court agreed with my position and held that the trustee had a clear statutory duty to file returns and pay taxes as a fiduciary in this situation. *Holywell*, 112 S.Ct. at 1024-1026.

REASONS FOR GRANTING THE WRIT

1. *The Court's Contempt Fine Payable As A Final Judgment To The United States Is A Serious, Noncompensatory Fine Imposed As A Punitive Sanction In Violation Of The Procedural Requirements Of Due Process Of Law Applicable To Allegations Of Criminal Contempt.* – In failing to confine the district court's exercise of its contempt power to the limits imposed by statutory authority, 18 U.S.C. Section 401, and in abandoning the appellate court's duty to exercise supervisory control of the district judge's usurpation of power to impose a fixed, noncompensatory, and retrospective fine payable to the United States, which fine was not purgable upon payment to the trustee of the compensatory civil contempt fine, the court of appeals sanctioned the district court's violation of the procedural protections of due process of law afforded in a criminal contempt proceeding.

In *International Union, UMWA v. Bagwell,* this Court held, quoting *United States v. United Mine Workers of America,* 330 U.S. 258, 303-304 (1947) that "[a] contempt fine is considered civil and remedial if it either 'coerce[s] the defendant into compliance with the court's order, [or] . . . compensate[s] the complainant for losses sustained'," 114 S.Ct. at 2558.

This Court has also held, citing *Penfield Co. v. SEC,* 330 U.S. 585, 590, 67 S.Ct. 918, 921, 91 L.Ed. 1117 (1947) that "[w]here a fine is not compensatory, it is civil only if the contemnor is afforded the opportunity to purge . . . [and] a 'flat, unconditional fine' totalling even as little as $50 announced after a finding of contempt is criminal if the contemnor has no subsequent opportunity

to reduce or avoid the fine through compliance," 114 S.Ct. at 2558.

If the district judge's exercise of the court's contempt power was civil and remedial for the purpose of compensating the trustee, then the coercive fine payable to the United States should have been suspended pending future compliance and vacated upon payment of the final judgment payable to the trustee as a civil compensatory fine, see 114 S.Ct. at 2558, citing *United Mine Workers*, supra, ["fixed fines also may be considered purgable and civil when imposed and suspended pending future compliance."]

This Court's opinion, in *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441, 31 S.Ct. 492, 55 L.Ed. 797 (1911), which was cited and quoted in *International Union, UMWA v. Bagwell*, is determinative of the question of whether the district judge's exercise of the court's contempt power as a final judgment payable to the United States was civil or criminal:

> [A] contempt sanction is considered civil if it is "remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court. *Ibid.*" 114 S.Ct. at 2557.

A serious criminal contempt fine cannot be imposed "absent the full protection of a criminal jury trial," 114 S.Ct. at 2560, citing *Bloom v. Illinois*, 391 U.S. 194, 210, 88 S.Ct. 1477, 1486, 20 L.Ed. 2d 522 (1968).

In *Hicks v. Feiock*, 485 U.S. 624, 639, n.10, 108 S.Ct. 1423, 1438, n.10, 99 L.Ed. 721 (1988), citing *Nye v. United States*, 313 U.S. 33, 42-43 (1941), quoting *Union Tool Co. v.*

Wilson, 259 U.S. 107, 110 (1922), this Court held "[i]t is also true, of course, that if both civil and criminal relief are imposed in the same proceeding, then the 'criminal feature of the order is dominant and fixes its character for purposes of review'."

This appeal's principal question is whether the district court's order entering a final judgment payable to the United States was a punitive sanction imposed to vindicate the court's authority rather than a compensatory fine payable to the complainant.

The bankruptcy judge found that my refusal to comply with the court's order to turn over the sale proceeds of the concrete pumps to the trustee was a direct criminal contempt, App. 35, and the district court's final judgment "which the United States can execute upon should Gould ever acquire reachable assets," App. 14, fixed the fine's character as criminal. It is clear that the district court's final judgment payable to the United States is a serious criminal penalty which the court lacked authority to enter, see *International Union, UMWA v. Bagwell*, 114 S.Ct. at 2560, citing *Bloom*, 391 U.S. at 210, 88 S.Ct. at 1486 ["Direct contempts . . . cannot be punished with serious criminal penalties absent the full protections of a criminal jury trial."] This Court's *International Union, UMWA v. Bagwell* opinion clearly limits a court's contempt power, without the right to trial by jury, to the imposition of noncompensatory petty fines, 114 S.Ct. at 2563.

The opinion of the court of appeals that my challenge to the "legality of the order to turn over proceeds [of the concrete pump's sale] and the contempt order have already been presented to this Court and found without

merit, and are, therefore barred," App. 2, does not resolve the question of whether the district court's order was erroneous with respect to the court's imposition of the "flat, unconditional fine" payable to the United States.

In *Matter of Christensen Engineering Co.*, 194 U.S. 458, 461 (1904), a case in which the contempt fine was payable one-half to the complainant and the other half to the United States, this Court held that "the fine payable to the United States was clearly punitive and in vindication of the authority of the court, and . . . as such it dominates the proceedings and fixes its character"; also *In re Merchants' Stock Co.*, 223 U.S. 639, 642 (1912) ["the punitive feature of the order is dominant and fixes its character for purposes of review"]. In the present case, however, the United States stated that it was not a party to the proceedings, App. 105, did not file a brief defending the government's right to collect the court's contempt fine payable as a final judgment, and construed the proceedings as a civil contempt.

The standard applicable to this case was defined in *Doyle v. London Guarantee Co.*, 204 U.S. 599, 606 (1907):

> Was the judgment rendered in the contempt proceeding criminal in its nature, and having for its object the vindication of the authority of the court, or was it one in the nature of a proceeding to enforce an order seeking protection of the rights of the party for whose benefit it was made?

The contempt charged was criminal, not civil, and the district judge misconstrued this Court's *United Mine Workers'* opinion for the determination of the circumstances under which a court has the power to impose a

fixed coercive civil fine, App. 35. The court's final judgment is a serious, punitive sanction to vindicate the judge's authority and the U.S. Justice Department believes that the government is entitled to collect the contempt fine, App. 108.

The district court's exercise of its contempt power to impose a noncompensatory civil fine payable to the United States was a usurpation of power. In *United Mine Workers*, this Court held that a $3,500,000 fine imposed against the union was criminal and excessive; the Court reduced the sanction to a criminal fine of $700,000, imposed and suspended the remainder as a coercive civil fine subject to the union's compliance with the lower court's order, 330 U.S. at 307, 67 S.Ct. at 703.

In the present case, the bankruptcy court's daily fine of $1,000, imposed as of August 1, 1989, was not suspended during the proceedings before the district court and the district court's order, entered on May 17, 1991, App. 36, did not provide that the sanctions imposed by the bankruptcy judge would be purged upon compliance with the district court's turnover order. The final judgment payable to the trustee has been satisfied, App. 66. Nevertheless, the United States has sought to retain the reward which the Internal Revenue Service granted to me for defeating the fraudulent scheme of the Bank and the trustee to evade the payment of taxes under the provisions of the Bank's plan, *supra* at 12, a scheme which stripped me of all my assets, 112 S.Ct. at 1026, and imposed the taxes attributable to the sale of the property in the trustee's fiduciary custody as a personal liability on me, App. 75; also 112 S.Ct. at 1027.

2. *The Court Of Appeals Has Sanctioned The Wrongful Conduct Of A Trustee Appointed As An Officer Of The Court To Act As A Fiduciary Under The Provisions Of A Plan Which Is A Nullity.* – The affirmance by the court of appeals that the creation of the Miami Center Liquidating Trust is lawful under the provisions of the Bank's erroneously approved plan, App. 31, raises important questions of first impression with respect to the administration of the bankruptcy laws: What are the applicable procedures for vacating, as a nullity, a substantially consummated plan? Will the courts enforce a plan which violates the law and enriches the plan's proponent?

11 U.S.C. Section 1129 provides that a bankruptcy court has statutory authority to confirm a plan "only if all" of the enumerated requirements of subsection (a) are satisfied, and "if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted the plan," 11 U.S.C. Section 1129(b).

The Bank's amended plan was confirmed without a confirmation hearing; see *In re Acequia,* 787 F.2d 1352, 1358 (9th Cir. 1986), citing *Technical Color and Chemical Works, Inc. v. Two Guys From Massapequa, Inc.,* 327 F.2d 737, 742 (2nd Cir. 1964) ["The Bankruptcy Court must hold an evidentiary hearing in ruling on confirmation."]; and the plan subordinated the allowed claims of insiders without a hearing in accordance with 11 U.S.C. Section 510(c). see *In re Holywell,* 913 F.2d at 880.

The debtors' appeal of the bankruptcy court's order confirming the Bank's amended plan was dismissed as moot, see *Miami Center,* 838 F.2d at 1553, notwithstanding

that the Eleventh Circuit's "Miami Center" mootness doctrine is not based on constitutional or statutory authority, see *Miami Center*, 838 F.2d at 1553 ["The mootness standard is preserved in the present bankruptcy code at 11 U.S.C. § 363(m), but . . . Section 363(m) does not apply where the debtor's assets have been sold, as here, by a liquidating trustee pursuant to a plan of liquidation"].

The *Miami Center* mootness doctrine is in conflict with the decisions of the other courts of appeal; see *Matter of Combined Metals Reduction Co.*, 557 F.2d 179, 194-95 (9th Cir. 1977) [mootness doctrine is not applicable if the plan was erroneously confirmed], *Matter of King Resources Co.*, 651 F.2d 1326, 1332 (10th Cir. 1980, *Matter of Latham*, 823 F.2d 108, 111 (5th Cir. 1987), *In re Joshua Slocum Ltd.*, 922 F.2d 1081, 1084 (3rd Cir. 1990) ["only two provisions of the Bankruptcy Code . . . specifically require that a party seek a stay pending appeal. . . . We decline to . . . create a third situation where parties are required to seek a stay"], *In re AOV Indus.*, 792 F.2d 1140, 1149 (D.C. Cir. 1986) [mootness doctrine unavailable where defendant can "make partial or total restitution to the Debtor's estate"], and *Ohio v. Madeline Marie Nursing Homes*, 694 F.2d 449, 463 (6th Cir. 1982) [inapplicability of mootness doctrine where disgorgement or other equitable relief available]. In *Atlas Sewing Centers, Inc.*, 384 F.2d 66, 89 (5th Cir. 1967), the Fifth Circuit held:

> It would be shocking if merely because of the entry of an order which by name and content was an order of substantial consummation, the Court would find itself powerless to take protective action in the face of admitted substantial nonfulfillment and, worse, a demonstrated

probability that the Plan can never be consummated."

A second panel of the Eleventh Circuit later held on the merits that the Bank's plan did not comply with the requirements of Section 1122, see 11 U.S.C. Section 1129(a)(1), *In re Holywell Corp.*, 913 F.2d at 879-880, and concluded that the Bank's plan, as modified, wrongfully subordinated the claim of an impaired creditor, *Id.* at 881; see *Norwest Bank Worthington v. Ahlers*, 108 S.Ct. 963, 966 (1988) ["Under current law, no Chapter 11 reorganization plan can be confirmed over the creditor's legitimate objections . . . if it fails to comply with the absolute priority rule."]

In *National Surety Co. v. Coriell*, 289 U.S. 426, 435 (1932), this Court held that "the plan should have been reversed in its entirety because the procedure pursued by the District Court was improper . . . ," and in *Protective Committee v. Anderson*, 390 U.S. 414, 441 (1967). this Court concluded that "[a] bankruptcy court is not to approve or confirm a plan of reorganization unless it is found to be 'fair and equitable'."

Furthermore, this Court's opinion that the Bankruptcy Code expressly permits the creation of a liquidating trust under the provisions of a Chapter 11 confirmed plan, *Holywell*, 112 S.Ct. at 1026, and that I "did not contribute anything to the trust," 112 S.Ct. at 1027, raises serious tax problems. The "estate" referred to in 26 U.S.C. Section 1398 is the estate created under title 11, and upon termination of the individual debtor's "Chapter 11 estate," the discharged debtor succeeds to the estate's tax attributes, 26 U.S.C. Section 1398(i). However, under 26

U.S.C. Section 661(a), the allowable tax deductible expenses of a trust accumulating income or distributing corpus shall not exceed the trust's distributable net income for the taxable year. An individual's allowable tax deductible expenses are defined in IRC Sections 161-167.

The bankruptcy laws do not supersede the tax laws, see *United States v. Herron*, 87 U.S. 251, 261 (1873), and the problem is unsolvable within a framework that allows the transfer of the property of an individual debtor's estate to a "liquidating trust" which is treated as a trust for tax purposes and subsumes the property of a corporation, unless the plan's proponent seeks a revenue ruling or the consent of the Internal Revenue Service. In the present case, the Internal Revenue Service concluded that the Bank's plan was a scheme to avoid taxes, and on remand to the district court from the Eleventh Circuit, *Holywell, et. al. v. Smith, et al.*, 965 F.2d 944 (11th Cir. 1992), to hold proceedings in conformity with this Court's *Holywell* opinion, the bankruptcy court held the Bank liable for negligent misrepresentation as the plan's proponent, because (a) "the bank failed to include any analysis of the tax consequences of the proposed plan of reorganization scheme in its disclosure statement," *Smith v. Bank of New York*, 161 B.R. 302, 307 (Bkrtcy. S.D. Fla. 1993) [11 U.S.C. Section 1129(a)(2) requires that the plan's proponent comply with the applicable provisions of chapter 11, such as Section 1125 regarding disclosure], and (b) "the bank's representations concerning the feasibility of the plan were materially false," *Id.*, see 11 U.S.C. Section 1129(a)(11).

The Bank's plan did not satisfy the requirements of 11 U.S.C. Section 1129(a)(1), (a)(2), (a)(3), (a)(9)(B)(ii), (a)(11), and (b)(1). Nevertheless, the Eleventh Circuit's *Miami Center* mootness ruling concluded that the original bankruptcy judge's adoption *in toto* of the Bank's proposed findings of fact and conclusions of law, see 838 F.2d at 1551, n.4, was not erroneous, see *supra* at 12, n.9, and that the "fairness, feasibility, and propriety" of the Bank's plan had been verified, *Id.* at 1557.

The Eleventh Circuit's Miami Center mootness doctrine has provided the basis for decisions of the court of appeals which have enriched the Bank:

(a) the Bank was allowed to take postpetition interest on its undersecured claim as a credit, in the amount of $27,050,115, against the proceeds of the Miami Center's sale, see *In re Holywell Corp.*, No. 88-0151-Civ (S.D. Fla. July 21, 1988), *appeal dismissed* 923 F.2d 865 (11th Cir.), *cert. denied*, 111 S.Ct. 2259 (1991);[14]

(b) the Bank was allowed to overcharge interest under the loan documents, in an amount exceeding $13,130,086, see *In re Holywell Corp.*, 901 F.2d 931, 934 (11th Cir. 1990), *cert. denied*, 111 S.Ct. 713 (1991) ["The amount of interest . . . was included in the Bank's bargain

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[14] Compare 11 U.S.C. Section 506(b); *United Savings Ass'n v. Timbers of Inwood Forest*, 108 S.Ct. 626 (1988), citing *Vandston Bondholders Committee v. Green*, 329 U.S. 156 (1946); also *Nicholas v. United States*, 384 U.S. 678 (1966).

for the purchase of the project which constituted a large part of the confirmed plan."];[15]

(c) the court of appeals concluded that it was impossible to unwind the plan's provision for substantive consolidation of the debtors' estates, which caused the elimination of claims with a priority superior to the Bank's liens, including ground rent in the amount of $5,300,000, and super-priority loans in the amount of $4,981,344, which the bankruptcy court had authorized in accordance with 11 U.S.C. Section 364(c), see 838 F.2d at 1552; and

(d) under the "owed and owned" theory, the trustee was allowed to cause the liquidation of Holywell's non-debtor subsidiaries and the distribution of a dividend to the Miami Center Liquidating Trust for the purpose of conveying property, which cost more than $8.8 million, to the Bank without consideration, *Holywell Telecommunications Company, et al. v. Bank of New York*, No. 85-3431 slip op. (S.D. Fla. May 24, 1989), *appeal dismissed*, 923 F.2d 865 (11th Cir. 1991)].

The "unjust enrichment theory" of the law of fiduciaries should have precluded such conduct, see *Peninsular Land Co. v. Howard*, 149 Fla. 772, 6 So.2d 384, 389 (1941) ["one who has acted in bad faith [and] resorted to trickery and deception, or been guilty of fraud, injustice or unfairness . . . " should not be unjustly enriched.]

Prior to the trustee's commencement of distribution under the provisions of the Bank's plan, if the trustee had

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[15] Compare 11 U.S.C. Section 502(b)(1); see *Sexton v. Dreyfus*, 219 U.S. 339 (1911).

objected to the Plan's defects, with notice to interested parties, instead of seeking the Bank's indemnification to hold himself personally harmless for his actions under the provisions of the Bank's plan, and had acted with undivided loyalty as the fiduciary of my estate, *Holywell*, 112 S.Ct. at 1026, his conduct would have been proper for an officer of the court and these contempt proceedings would not have occurred. Instead, the trustee has acted as the Bank's "strawman."

Respect for the judges of a court is based only on the administration of the law and as this Court stated in *International Union, UMWA v. Bagwell*, quoting *Bloom*, 391 U.S. at 208, 88 S.Ct. at 1485, "[w]e cannot say that the need to further respect for judges and courts is entitled to more consideration than the interest of the individual not be subjected to serious criminal punishment without the benefit of all the procedural protections worked out carefully over the years and . . . [g]enuine respect, which alone can lend true dignity to our judicial establishment, will be engendered, not by the fear of unlimited authority, but by the firm administration of the law . . . ," 114 S.Ct. at 2563.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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Charlottesville, VA 22906
(804) 295-7125

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-5042
Non-Argument Calendar

D. C. Docket Nos. 89-2629-CIV-SM
84-1590-04-SMW
(Filed Nov. 17, 1994)

IN RE: HOLYWELL CORPORATION,

Debtor.

THEODORE B. GOULD,

Plaintiff-Appellant,

versus

FRED STANTON SMITH, as Trustee of
the Miami Center Liquidating Trust,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(November 17, 1994)

Before DUBINA, BLACK and BARKETT, Circuit Judges.

PER CURIAM:

Appellant Theodore B. Gould appeals the district court order granting the motion to enforce the bankruptcy court's contempt order and challenges the bankruptcy court's order to turn over proceeds from the sale of property to a trust and the bankruptcy court's contempt order and fine for failure to turn over proceeds. Gould's challenges regarding the legality of the order to turn over proceeds and the contempt order have already been presented to this Court and found without merit, and are, therefore, barred. As to the remaining issue, whether the contempt order should not have been enforced because of inability to pay, Gould created his own inability to comply with the order to turn over proceeds, resulting in the failure of the purgation defense.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-5042

(Filed Jan. 17, 1995)

IN RE: HOLYWELL CORPORATION,

Debtor.

THEODORE B. GOULD,

Plaintiff-Appellant,

versus

FRED STANTON SMITH, as Trustee of the Miami Center Liquidating Trust,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: DUBINA, BLACK and BARKETT, Circuit Judges.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be

polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Susan Black
UNITED STATES CIRCUIT JUDGE

United States Court of Appeals
FOR THE ELEVENTH CIRCUIT

No. 93-5042
Non-Argument Calendar

D. C. Docket Nos. 84-1590-04
and 89-2629-CIV
(Filed Nov. 15, 1994)

IN RE: HOLYWELL CORPORATION,

Debtor.

THEODORE B. GOULD,

Plaintiff-Appellant,

versus

FRED STANTON SMITH, as Trustee of
the Miami Center Liquidating Trust,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

Before DUBINA, BLACK and BARKETT, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be and the same is hereby AFFIRMED;

It is further ordered that plaintiff-appellant pay defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

Entered: November 17, 1994
For the Court: Miguel J. Cortez, Clerk

By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: FEB 01 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 89-2629-CIV-MARCUS

THEODORE B. GOULD,

Appellant,

v.

FRED STANTON SMITH, as Liquidating Trustee of the Miami Center Liquidating Trust,

Appellee.

_____/

In Re:

HOLYWELL CORPORATION, et al.,

Debtors.

_____/

MEMORANDUM OPINION AND ORDER OF FINAL JUDGMENT

(Filed Aug. 31, 1993)

THIS CAUSE comes before the Court upon the amended motion by Miami Center Liquidating Trust Trustee to enforce this Court's May 17, 1991 Order (finding Appellant Theodore B. Gould in civil contempt for failure to deliver to the Trustee $66,500 in proceeds from the sale of property of the estate, and imposing a daily fine of $1000.00 per day until the funds were paid) by reducing the fine to a money judgment in favor of the Trustee, and to consider the imposition of incarceration or criminal contempt as a sanction for Gould's willful non-compliance with the Orders of this Court and the United States Bankruptcy Court. The Bank of New York, a $23 million creditor of the bankruptcy estate by virtue of its status as mortgagee of the Miami Center, has joined in the

Trustee's amended motion, and seeks additionally to deny the debtor, Gould, his discharge.

As there is no dispute that final judgment should be entered against Gould as to the proceeds from the sale of the property of the estate plus interest, as well as to the civil contempt fine, final judgment in those amounts shall be entered as set out below. Because the Bank of New York lacks standing to move for a revocation of Gould's discharge, its motion must be denied. To the extent that the Trustee seeks the imposition of criminal contempt sanctions, this Court declines *sua sponte* to proceed with criminal contempt. To the extent that criminal contempt proceedings may be appropriate, the matter should be referred to the United States Attorney for the Southern District of Florida to conduct whatever inquiry or review he may deem to be appropriate.

I.

On August 1, 1989, United States Bankruptcy Court Sidney M. Weaver ordered that debtor Theodore B. Gould would be in contempt of court if he failed to remit to the Liquidating Trustee approximately $65,000 in proceeds from the sale of Property of the Estate. Gould, a chapter 11 debtor, had purchased certain concrete pumps and other equipment, which, upon his filing a petition in Chapter 11, became property of the estate. Pursuant to the Plan of reorganization, the pumps became property of the Miami Center Liquidating Trust. Gould sold the pumps but did not deliver the proceeds to the Liquidating Trustee as the Trustee had directed Gould, instead, as he represented to Bankruptcy Judge Weaver, he invested

them in short-term commercial paper with a brokerage firm the identity of which Gould refused to divulge. *See* Transcript of Hearing before Hon. Sidney Weaver, at 63, 68 (July 27, 1989). The August 1, 1989 Order of the Bankruptcy Court found Gould in contempt if he failed to deliver the funds to the Trustee by August 4, 1989, and imposed a $1,000 per diem fine as a civil contempt sanction to coerce Gould's compliance should he refuse to pay the proceeds to the Trustee pursuant to Judge Weaver's Order.

Gould did not comply, and Judge Weaver certified to this Court that Gould was in contempt on August 14, 1989. After proceedings in this Court, by Order of May 17, 1991, this Court found Gould in civil contempt, ordering Gould to turn over, within seven days, the $67,500 sales proceeds, together with any interest earned, less $1000 in expenses incurred in consummating the sale. The Order advised that failure to comply

> shall result in the imposition of sanctions, including but not limited to a daily fine in the amount of $1000 per day for each day that Mr. Gould may fail to comply.

May 17, 1991 Order at 9.

On June 25, 1991, this Court entered an Order denying motion for rehearing and denying motion for stay. The motion for stay was premised on the then-recent granting of certiorari by the United States Supreme Court on a lawsuit arising from the same bankruptcy, addressing whether the Trustee is responsible for payment of income taxes on the sale of post-confirmation properties. We had already noted in the May 17, 1991 Order that the

tax issue appeared to the Court to be irrelevant to the issue of ownership of the concrete pumps. Gould argued that he could not comply with the Order to pay the Trustee since he had used the funds which he was required to turn over to the Trustee to pay the law firm of Arnold & Porter to appeal the tax obligation issue. The June 25 Order observed that this representation appeared to conflict directly with those representations made before the bankruptcy court at which time Gould stated that he had invested the proceeds in commercial paper.[1]

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[1] At the July 27, 1989 hearing before the Bankruptcy Court, counsel for the Liquidating Trustee read Mr. Gould's deposition testimony into the record, and Mr. Gould then adopted those statements in open court:

> Q. Did you receive the proceeds in the form of a cashiers check for $67,500, payable to you only?
> A. Yes.
> Q. Did you keep the proceeds?
> Page 10:
> A. The Proceeds have been invested.
> Q. Where is the $67,500 less the thousand dollars present?
> A. Invested in GMAC 30 day paper at 9.21 percent interest.
> Q. In whose name is the account held?
> A. In my name.
>
> * * *
>
> THE COURT: Do you find any fault with Mr. Stettin's Presentation?
> MR. GOULD: No, just to the extent that it's necessary to attribute – to characterize these funds as being taxable income of my bankruptcy estate.
> MR. STETTIN: I don't think that is necessary for the determination that I wish the Court to make. I will say

The Order noted further that Gould's statements to the Bankruptcy Court[2] "illustrate his intention to flout any orders of any court requiring him to return the proceeds of the concrete pump sales." Order at 5 (June 25, 1991).

On August 9, 1991, the Liquidating Trustee filed a motion to enforce the May 17, 1991 Order Affirming Finding of Contempt. Consideration of that motion was stayed, however, by the pending appeal to the Eleventh Circuit of the Contempt Order (filed July 3, 1991).

The United States Court of Appeals for the Eleventh Circuit affirmed the May 17, 1991 Contempt Order *per curiam without opinion* on July 6, 1992. The Court of appeals then denied petition for rehearing and suggestion for rehearing *en banc* on Sept. 3, 1992. On Oct. 15, 1992, the Court of Appeals denied Gould's motion for stay or recall of the mandate pending petition for writ of certiorari.

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it's property of his estate and therefore belongs to the liquidating trust.

THE COURT: Do you have any problem with that?

MR. GOULD: No.

Tr. of Hearing, at 63, 68-69 (July 27, 1989).

[2] Gould stated in his deposition, and adopted those statements as part of the record of the proceedings before Judge Weaver by stipulation in open court, *see* Tr. of Hearing before Hon. Sidney Weaver, at 68 (July 27, 1989), that:

> I will not turn over the funds until there is a resolution of the trustee's responsibility for the payment of income taxes for the bankruptcy estate since I considered Judge Weaver's decision with respect to the income taxes, that is the Trustee's lack of responsibility, I consider that null and void.

Id. at 64-65.

The Liquidating Trustee renewed its motion to enforce by filing the instant Amended Motion to Enforce May 17, 1991 Order Affirming Finding of Contempt. The Trustee notes that the $1000 per day fine totalled $1,136,000 as of the date of the filing of the motion (September 10, 1992), and asks that the fine be reduced to a money judgment in favor of the Trustee and against Gould individually, and also asks the Court to reserve jurisdiction to consider incarceration as punishment for the misrepresentation Gould made to the Court about what he did with the proceeds. The Bank of New York is a creditor of the Liquidating Trust, and has joined in the Trustee's motion to enforce, moving additionally for revocation of Gould's bankruptcy discharge.

A purgation hearing was held by this Court on March 8, 1993 at which time Gould asserted that he had no assets with which to pay the amount owing to the Trustee and therefore was unable to purge himself of the contempt; accordingly, he sought an order purging or vacating the contempt order. The Trustee then sought leave to depose Gould in aid of execution, which leave was granted, and deposition taken on March 18, 1993.

At the March 24, 1993 hearing, both the Trustee and Gould agreed that there was no dispute that Gould had failed to comply, but at the present time did not have the funds to pay the Trustee and was therefore unable to comply. *See* Transcript of Hearing before Hon. Stanley Marcus, at 11-13. Consequently, the Trustee suggested that the civil contempt sanction of a fine was no longer coercive, and that even incarceration would not produce compliance. The Trustee urged the Court to enter final judgment against Gould in the amounts owing to the

Trustee and the United States of America, and requested that the Court consider imposing criminal contempt as a sanction for Gould's willful disobedience of valid Orders of the [sic] this Court and the Bankruptcy Court.

II.

The precise issue presented is whether Gould has purged himself of contempt by virtue of his inability to comply with this Court's Order of contempt. Inability to comply with an order is ordinarily a complete defense to contempt proceedings. *See United States v. Rylander,* 460 U.S. 752, 757, 103 S.Ct. 1548, 1552 (1983); *Newman v. Graddick,* 740 F.2d 1513, 1528 (11th Cir. 1984). The defense is unavailable, however, where the contemnor created his own inability. *See Pesaplastic, C.A. v. Cincinnati Milacron Co.,* 799 F.2d 1510, 1521 (11th Cir. 1986); *Phoenix Marine Enterprises, Inc. v. One Hylas 46' Convertible Sportfisherman Hull #1,* 681 F. Supp. 1523, 1530 (S.D. Fla. 1988), *aff'd,* 846 F.2d 753 (11th Cir. 1988); *Piambino v. Bestline Products, Inc.,* 645 F. Supp. 1210, 1215 (S.D. Fla. 1986).

Here, Gould created his own inability to comply by using the proceeds from the sale of the concrete pumps to pay the law firm of Arnold & Porter for the prosecution of the appeal of an unrelated issue in the bankruptcy case. On more than one occasion, Gould himself represented to this Court that he used the funds to pay Arnold & Porter. *See, e.g.,* Tr. of Hearing at 43 (March 24, 1993). Furthermore, Gould himself offered the affidavit of one Edgar Schumacher, Jr., the "informal tax CPA for Theodore B. Gould and his wife Helen," who swore under oath that

> The net sale proceeds from the sale of the concrete pumps were deposited by Mr. Gould in his business checking account at Crestar bank and were subsequently paid out to retain and pay initial Arnold & Porter legal fees incurred in taing [sic] the income tax case into the United States Supreme Court.

Schumaker [sic] Aff. at ¶¶ 2, 7.

We find that at present, Gould is unable to pay and thereby purge himself of civil contempt. Therefore further amassing of the $1000 per day fine is unavailing and no longer coercive. Thus, the running of the daily fine should be terminated, and the outstanding balance reduced to a judgment which the United States can execute upon should Gould ever acquire reachable assets.

There being no real dispute that Gould himself created his inability to deliver the proceeds from the sale of the concrete pumps to the Trustee pursuant to the valid Orders of the Bankruptcy Court and this Court, we cannot find cause to reward his conduct by vacating the formal order of contempt. Although the sanction that accompanies a finding of civil contempt usually takes the form of incarceration or a fine, several courts have issued civil contempt orders "standing alone." *See e.g., Hecht v. Don Mowry Flexo Parts, Inc.*, 111 F.R.D. 6 (N.D. Ill. 1986) (adjudging civil defendant in contempt for failure to comply with a trial subpoena duces tecum, but declining to impose any sanctions at all since the trial was over and since plaintiff had not shown that he suffered any monetary damages); *United States v. Professional Air Traffic Controllers Organization*, 678 F.2d 1, 5 (1st Cir. 1982) (holding that a "bare finding of civil contempt may stand"). While

Mr. Gould is unable to comply, the sanction of a fine or incarceration can no longer be said to be coercive and any further sanction as a means of coercing compliance with the Court Orders would be ineffectual and therefore would be purely punitive in nature. On this record, however, we cannot find that Mr. Gould has purged himself of civil contempt.

The Trustee has moved this Court to consider the commencement of criminal contempt proceedings as a sanction for Gould's willful noncompliance. We decline the Trustee's invitation to proceed *sua sponte* with criminal contempt proceedings. To the extent that criminal contempt proceedings may be appropriate, the matter should be presented to the United States Attorney for the Southern District of Florida for whatever review or inquiry he may deem appropriate.[3]

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[3] The Trustee has suggested that a charge of criminal contempt is amply supported by the record. For example, the Schumacher Affidavit submitted by Gould indicates not only that the proceeds were ultimately used to pay Arnold & Porter but also that the proceeds were deposited by Gould "into his business checking account." Schumaker [sic] Aff. at ¶ 7. This appears to conflict directly with Gould's representation to the Bankruptcy Court that the proceeds were invested into commercial paper. Tr. at 63, 68 (July 27, 1989). Aside from this discrepancy in Gould's sworn statements, the record indicates his firm intention to flout the valid Order of the Bankruptcy Court to turn over the proceeds of the concrete pump sales. *See Supra*, note 2. Even accepting – solely for the sake of argument – Gould's representation that he invested the proceeds in commercial paper, a searching review of the transcript of the hearing held by Judge Weaver reveals no representation by Gould that he planned to redeem the instrument and *expend* the very funds at issue in order to appeal the income tax liability

III.

The Bank of New York's request that Gould be denied his discharge is somewhat misplaced. A bankruptcy court may deny the debtor a discharge where the debtor has disobeyed a court order. The relevant Bankruptcy Code provision reads:

> The court shall grant the debtor a discharge unless –
>
> * * *
>
> (6) the debtor has refused, in the case –
>
> (A) to obey any lawful order of the court, other than an order to respond to a material question, or to testify. . . .

11 U.S.C. §727(a)(6).[4] Obviously, Gould has refused to obey lawful orders of the Bankruptcy Court and of this Court. The Bankruptcy Court did not deny the discharge, although under the statute it could have, and instead certified Gould in civil contempt. Of course, questions of law or mixed questions of law and fact must be determined independently by the district court, *see* Bankr. Rule 8013, but we are unable to find any case in which the district court itself revoked a discharge *sua sponte*, i.e., where the bankruptcy court had not already done so. The cases cited by Bank of New York are not to the contrary,

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question the resolution of which he stated he would await before complying with Judge Weaver's Order.

[4] Although that provision falls within Chapter 7, it is applicable to a Chapter 11 case through § 1141(d)(3)(C) which states that the reorganization will not act as a discharge if "the debtor would be denied a discharge under Section 727 if the case were a case under Chapter 7." 11 USC § 1141(d)(3)(C).

but merely stand for the proposition that it is within the bankruptcy court's power to deny or revoke a discharge where the debtor has disobeyed a court order. *Kershaw v. Behm*, 81 B.R. 897 (M.D. Tenn. 198); *In re Richardson*, 67 B.R. 624 (Bankr. W.D. Mo. 1986); *In re Sweigard*, 35 B.R. 676 (Bankr. N.D. Ohio 1983).

The decision in *In re Curry*, 99 B.R. 409 (Bankr. N.D. Ill. 1989), suggests that "[w]hen a Chapter 11 plan is confirmed and the debtor fails to pay, the creditor's remedy is not to seek a revocation of the discharge, but rather to enforce the debtor's obligation to the creditor arising out of the Chapter 11 proceedings." *Id.* at 410. Certainly the debtor here has done worse than merely "failed to pay" according to the Plan. Gould has flouted a court order. The remedy for a Chapter 11 creditor who did not receive a scheduled payment would be to sue to reduce the payment to a money judgment. Bank of New York, however, is a creditor of the *Trust* and was not entitled to payment of the $66,000 at issue directed from *Gould*, so the Bank of New York would not have standing to sue on that indebtedness.

It is therefore

ORDERED AND ADJUDGED that the amended motion to enforce contempt is GRANTED AS FOLLOWS:

(1) Final Judgment shall be entered in a companion order in favor of the Liquidating Trustee and against Theodore B. Gould in the amount of $67,500.00, representing the amount of the sales proceeds received in the sale of the concrete pumps and related equipment, plus any interest earned on or since the sale of the pumps, less $1,000.00 in expenses incurred in consummating the sale,

and statutory prejudgment interest at the rate of 12% from August 1, 1989 through the date of this judgment. *See* Fla. Stat. § 687.01 (1989).

(2) Final Judgment shall be entered in an additional order in favor of the United States of America and against Theodore B. Gould for in the amount of $1,331,000.00. This judgment shall bear interest at the rate prescribed by 28 U.S.C. §1961(a). This amount is the outstanding balance of the civil contempt fine imposed against Theodore B. Gould at the rate of $1,000 per day for failure to comply with the Orders of the Bankruptcy Court and this Court to turn over the proceeds from the sale of the concrete pumps. The penalty is calculated from August 1, 1989 through March 24, 1993, the date of the last hearing on this matter.

(3) The running of the $1000/day civil contempt sanction is terminated as it is no longer coercive.

It is further ORDERED AND ADJUDGED that the motion of the Bank of New York to revoke Gould's bankruptcy discharge is DENIED for lack of standing.

DONE AND ORDERED in Miami, this 31st day of August, 1993.

/s/ Stanley Marcus
STANLEY MARCUS
UNITED STATES
DISTRICT JUDGE

Copies to:

Maureen Donlan, AUSA
Theodore B. Gould, pro se
Elizabeth Ruf Stein, AUSA
Herbert Stettin, Esq.

IN THE UNITED STATES BANKRUPTCY COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NOS: 84-01590-BKC-SMW
84-01591-BKC-SMW
84-01592-BKC-SMW
84-01593-BKC-SMW
84-01594-BKC-SMW

IN RE:

HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, THEODORE B. GOULD,

Debtors.
_____/

MOTION FOR CONTEMPT AND OTHER RELIEF

Fred Stanton Smith, as Trustee of the Miami Center Liquidating Trust ("Liquidating Trustee"), moves the Court for an order certifying Theodore B. Gould as being in contempt of this Court and for other sanctions, and says:

1. This case pends as a consolidated confirmed Chapter 11 proceeding in which Theodore B. Gould is one of the Chapter 11 Debtors.

2. On information and belief, the Liquidating Trustee has been advised, and therefore alleges, that at some time prior to the filing of the Chapter 11 cases, Theodore B. Gould paid for and acquired two concrete pumps which were used in the construction of the Miami

Center. On the filing of the Chapter 11 proceedings in August, 1984, these pumps became property of the estate, as provided in Section 541(a) of the Bankruptcy Code. At confirmation of the Plan of Reorganization, these pumps became property of the Liquidating Trust, as provided in the plan.

3. Thereafter, the pumps remained stored at the premises of the Miami Center after the sale of the property to the nominee of the Bank of New York.

4. In February 1989, the attorney for the Bank of New York demanded of the Liquidating Trustee that he move the concrete pumps from the premises. A copy of the demand letter of February 17, 1989 is attached hereto as Exhibit A. The Liquidating Trustee contacted Theodore B. Gould to determine whether the pumps were in fact stored on the bank's property. The Liquidating Trustee's response of February 28, 1989 is attached hereto as Exhibit B.

5. Thereafter, by letter dated March 6, 1989, the Bank of New York's nominee demanded the Liquidating Trustee pay the personal property taxes for the concrete pumps in question. A copy of the demand letter and 1988 personal property tax notice is attached hereto as composite Exhibit C.

6. A prospective purchaser named Lawrence McMillan, representing C.P.I. of Kansas City, Kansas, expressed interest in the concrete pumps for a construction job with which he was involved. The Liquidating Trustee referred Mr. McMillan to Edgar Schumacher of Holywell Corporation to discuss a purchase price.

7. On or about June 1, 1989, Mr. McMillan and his local attorney, Brad Lotspeich, advised the Liquidating Trustee that a price of $67,500.00 had been agreed upon between Mr. McMillan and Mr. Gould, and that Mr. Gould had shown them his canceled personal check issued prior to the filing of the petition initiating these proceedings as evidence that he paid for the concrete pumps in question. Mr. Gould further advised Mr. McMillan that he was only willing to proceed with the transaction if they would deliver to him a cashier's check payable to him individually for the purchase of the concrete pumps. Mr. McMillan and his attorney asked the liquidating trustee whether the Liquidating Trust had any continuing interest in the pumps. The Liquidating Trustee advised them of the interest of the Liquidating Trust. Mr. McMillan and his attorney advised the Liquidating Trustee they had spoken with Mr. Gould concerning this and Mr. Gould had said he would not enter into the agreement to sell the concrete pumps if he did not receive the funds.

8. Thereafter, the Liquidating Trustee was advised that on June 5, 1989 the sale was consummated and Mr. McMillan, as Trustee, had paid $67,500.00 in the form of a cashier's check to Theodore B. Gould as payment of the concrete pumps. A two page contract in the form of a bill of sale was executed to evidence the sale. The Liquidating Trustee does not yet have a copy of the agreement but is attempting to obtain one.

9. The concrete pumps are the property of the Liquidating Trust. Mr. Gould was well aware of the ownership interest of the Liquidating Trust in this property and chose to dispose of this property for the express purpose

of receiving the proceeds therefrom. Mr. Gould explained to the Liquidating Trustee that he would not permit any of the proceeds to be paid to the Liquidating Trust, or to be held by the Liquidating Trust, so long as the Liquidating Trustee failed or refused to pay income tax liabilities owed by the Debtors. As the Court is well aware, there is a final judgment in adversary proceeding 87-0627-BKC-SMW-A determining the Liquidating Trust has no obligation to file tax returns or pay income taxes owed by the Debtors.

10. Theodore B. Gould holds $67,500.00 that belongs to the Liquidating Trust and he should be required to pay over these sums immediately. His receipt of these monies is a willful and deliberate attempt to interfere in the operation of the Liquidating Trust. It is the latest in a series of acts designed to disobey this Court's orders, frustrate the Liquidating Trustee from completing his responsibilities under the terms of the plan, and is a violation of the Bankruptcy Code and his contractual responsibilities.

11. At an earlier stage in these proceedings, such conduct would have been sufficient to bar his discharge. At this stage in the proceedings, in addition to such other relief as would be appropriate, the Liquidating Trustee seeks an order certifying Theodore B. Gould as being in contempt of this Court's order of Confirmation and the provisions of Section 1142 of the Bankruptcy Code. Mr. Gould has converted to his own use property of the Liquidating Trust. Because his conduct was willful and designed to deliberately frustrate the operation of the Liquidating Trust, and because this is the latest in a series

of acts designed to frustrate the operation of the Liquidating Trust, it is appropriate that the punishment recommended by the Court should include effective means to punish this willful misconduct and to deter future misconduct.

12. In addition to such other relief as the Court deems appropriate, Mr. Gould should be fined on a daily basis until these funds have been restored to the Liquidating Trust.

WHEREFORE, the Liquidating Trustee moves the Court for an order certifying Theodore B. Gould as being in contempt, and for such other relief as the Court deems appropriate.

RESPECTFULLY SUBMITTED,

/s/ Herbert Stettin
Herbert Stettin, Esquire

IN THE UNITED STATES BANKRUPTCY COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NOS: 84-01590-BKC-SMW
84-01591-BKC-SMW
84-01592-BKC-SMW
84-01593-BKC-SMW
84-01594-BKC-SMW

IN RE:

HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, THEODORE B. GOULD,

Debtors.
_____/

ORDER FINDING THEODORE B. GOULD IN CONTEMPT

THIS CAUSE having come on to be heard on July 27, 1989, upon Motion for Contempt and other relief filed by the Liquidating Trustee, and the Court having reviewed the pleadings on file, having heard argument of counsel, and having reviewed a stipulated set of facts agreed to by the parties involved, and being otherwise fully advised in the premises, it is hereupon

ORDERED AND ADJUDGED as follows:

1. In October 1981, THEODORE B. GOULD purchased certain concrete pumps and related equipment. Upon the filing of his Chapter 11 proceeding in 1984, the concrete pumps and related equipment became property

of his estate pursuant to 11 U.S. Code, Section 541(a). Thereafter, pursuant to the terms of the confirmed Plan of Reorganization, the concrete pumps and related equipment became the property of the MIAMI CENTER LIQUIDATING TRUST.

2. In 1989, THEODORE B. GOULD was contacted by Lawrence G. McMillan, who was interested in buying the concrete pumps and related equipment. Before the sale was consummated, MR. GOULD was notified that the Liquidating Trust claimed the right to receive the sale proceeds. MR. GOULD refused to allow the sale proceeds to be paid to the Liquidating Trustee and insisted the contract for the sale of the concrete pumps and related equipment be made in his name, and that payment for the concrete pumps and related equipment be paid to him.

3. Thereafter, by Agreement dated June 2, 1989, THEODORE B. GOULD contracted to sell the concrete pumps and related equipment to Lawrence G. McMillan for $67,500.00. The funds were paid to MR. GOULD.

4. The funds are presently held by MR. GOULD in his name at a brokerage firm and have been invested in short-term commercial paper. MR. GOULD refuses to reveal the brokerage firm, refuses to turn the money over to the Trustee and has stated he will not obey any order of this Court to do so.

5. Upon the foregoing facts, the Court finds and determines that THEODORE B. GOULD is required to turn over to the Liquidating Trustee the $67,500.00 sale proceeds received, together with any interest earned, less $1,000.00 in expenses incurred in consummating the sale, together with any interest that may have been earned on

the sale by no later than 5:00 P.M. on Monday, July 31, 1989.

7. If MR. GOULD should fail to deliver to the Liquidating Trustee the funds described above, then in that event the Court fines THEODORE B. GOULD the sum of $1,000.00 for each day from and including August 1, 1989, until the funds are delivered as ordered. The fine will continue until the Order is obeyed. The fine is payable into the Court Registry. The Court finds and determines the imposition of this fine is a reasonable and necessary means of enforcing this Order, given the persistent and deliberate refusal of the Defendant, THEODORE B. GOULD to obey the Order of this Court and the frustration of the Liquidating Trustee's ability to perform his functions as Trustee. See *United Mine Workers of America*, 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884 (1947); and in re: *Chase and Sandborn Corp.* [sic] F.2d (11 Cir. May 1989) (slip sheet opinion at pages 2365-66).

8. If THEODORE B. GOULD shall fail and refuse to deliver over the monies as ordered by Friday, August 4, 1989, then in that event, in addition to the $1,000.00 a day fine referred to above, the Court further finds and certifies to the United States District Court that THEODORE B. GOULD is in contempt of this Court and its Orders by his failure and refusal to comply with its Orders concerning payment of monies to the Trustee. THEODORE B. GOULD should be punished by the continued imposition of the fine set out in this Order and by a period of incarceration not to exceed ten (10) days (or until compliance, whichever first occurs).

9. The Court further finds and determines this certification is for a contempt committed both under Rule 9020(a) and (b) of the Rules of Bankruptcy Procedure in that THEODORE B. GOULD was in the presence of the Court and was ordered to comply by the Court on July 27, 1989, and has announced his intention not to do so.

DONE AND ORDERED in Chambers, Miami, Dade County, Florida this 1 day of August, 1989.

SIDNEY M. WEAVER
United States
Bankruptcy Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

THEODORE B. GOULD Appellant, vs. FRED STANTON SMITH, Trustee of the Miami Center Liquidating Trust Appellee / IN RE: HOLYWELL CORPORATION et al. Debtors /	CASE NO. 89-2629-CIV-MARCUS ORDER (Filed May 17, 1991)

THIS CAUSE comes before the Court upon Motion by Fred Stanton Smith, the Trustee of the Miami Center Liquidating Trust, for an Order confirming the Bankruptcy Court's Order Finding Theodore B. Gould in Contempt, dated August 1, 1989.

On August 1, 1989, the United States Bankruptcy Court for the Southern District of Florida found Theodore B. Gould in contempt of court if he failed and refused to deliver over certain monies as ordered by August 4, 1989. *See* Order Finding Theodore B. Gould in Contempt, August 1, 1989, Case No. 84-01590-BKC-SMW, 84-01591-BKC-SMW, 84-01592-BKC-SMW, 84-01593-BKC-SMW, 84-01594-BKC-SMW, para. 8. On Aug. 14, 1989, the United States Bankruptcy Court certified to this Court that Theodore Gould was in contempt for his failure to comply with the Order of August 1, 1989. Such certification was

issued as provided in Rule 9020, Rules of Bankruptcy Procedure, and directed that Mr. Gould be punished as provided in the Order of August 1, 1989.

This Court conducted a hearing on December 14, 1990, concerning whether Mr. Gould was in contempt of Court for the reasons set forth in the decisions of the bankruptcy court. The relevant facts are as follows:

In October 1981, Theodore B. Gould purchased certain concrete pumps and related equipment. Upon the filing of his Chapter 11 proceeding in 1984, the concrete pumps and related equipment became the property of his estate pursuant to 11 U.S.C. § 541(a). Thereafter, and pursuant to the terms of the confirmed bankruptcy plan of reorganization, the concrete pumps and related equipment became the property of the Miami Center Liquidating Trust. *See* Order Finding Theodore B. Gould in Contempt at 1-2. In 1989, Mr. Gould was contacted by Mr. Lawrence G. McMillan who was interested in buying the concrete pumps and related equipment. Before the sale was consummated, Mr. Gould was notified that the Liquidating Trustee claimed the right to receive the sale proceeds. Mr. Gould refused to allow the sale proceeds to be paid to the Liquidating Trustee, insisting that the contract for the sale of the concrete pumps and related equipment be made in his name alone, and that payment be paid to him. *Id.* By agreement dated June 2, 1989, Mr. Gould contracted to sell the pumps and equipment to Mr. McMillan for $67,500. The funds were paid to Mr. Gould, without the consent of the Liquidating Trustee. *Id.*

Under the bankruptcy court's August 1, 1989 Order Finding Theodore B. Gould in Contempt, Mr. Gould was

required to turn over net proceeds from the sale of trust property. If Mr. Gould failed to comply by August 4, 1989, a $1000/day fine was to be imposed until the proceeds were turned over. The bankruptcy court further found Mr. Gould to be in violation of its Order and concluded that Mr. Gould should also be punished by a period of incarceration not to exceed ten (10) days. Moreover, the bankruptcy court concluded that Mr. Gould was found to be in criminal contempt in that Mr. Gould's failure to comply with the courts' orders was done in the presence of the court, and that Gould announced his intention not to comply. Funds from the sale are presently held by Mr. Gould in his name at a brokerage firm and have been invested in short-term commercial paper, according to Mr. Gould. He refuses to reveal the brokerage firm and refuses to turn the money over to the Trustee. He has stated he will not obey any order of the bankruptcy court to do so. *Id.*

In Mr. Gould's Reply to the Liquidating Trustee's Response to Objections to Certification of Contempt, he contends that (1) the bankruptcy court lacks post-confirmation jurisdiction over Mr. Gould; (2) the Liquidating Trustee was illegally appointed and therefore had no right to pursue this matter; (3) Mr. Gould is not required to turn over the proceeds from the sale of the concrete pumps because the Miami Center Liquidating Trust has evaded its tax obligations; and (4) the concrete pumps were not an asset of the Miami Center Liquidating Trust.

We address each of Mr. Gould's arguments in turn. First, the bankruptcy court does not lack post-confirmation jurisdiction over him. Article XIV of the confirmed

plan of reorganization explicitly provides that the bankruptcy court retains jurisdiction over Mr. Gould and his co-debtors in order to enter any order necessary or appropriate to enforce the plan.[1] The reorganization plan is confirmed and is the law of this case. *See Holywell Corp. v. Bank of New York*, 59 Bankr. 340 (S.D.Fla. 1986), *dismissed sub nom, Miami Center Liquidating Trust* [sic] *v. Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 823, 109 S.Ct. 69, 102 L.Ed. 2d 46 (1988). The plan is binding on Mr. Gould, pursuant to 11 U.S.C. § 1142.

Next, Mr. Gould argues that the concrete pumps are not assets of the Miami Center Liquidating Trust because they were not specially itemized as trust assets by the confirmed plan and thus reverted to him upon the confirmation of the plan. However, the reorganization plan as confirmed states clearly and unambiguously that *all* of

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[1] Article XIV, Retention of Jurisdiction, states specifically:

The Court shall retain jurisdiction after confirmation until all payments and distributions called for under the Plan have been made and until the entry of final decree, in respect to the following matters:

(a) to hear and determine all claims, including claims arising from the rejection of any executory contract and any objections which may be made thereto;

(b) to liquidate, or estimate damages or to determine the manner and time for such liquidation or estimation in connection with any contingent or unliquidated claims;

(c) to adjudicate all claims or controversies arising during the pendency of the Chapter 11 cases;

(d) to allow or disallow any claim; and

(e) to make any orders which may be necessary or appropriate to carry out the provisions of this Plan, including any orders relating to the reservation of equitable rights set forth in Article XIII hereof.

the debtors' assets, as defined by Section 541(a) of the Bankruptcy Code,[2] are assets of the Miami Center Liquidating Trust. *See* Article V of the plan.[3] The concrete pumps are Section 541(a) assets and the plan's provisions are binding. *See* 11 U.S.C. § 1142.

Third, Mr. Gould claims that the Liquidating Trustee cannot pursue this matter because the Trustee was appointed illegally in derogation of the Bankruptcy Code. Article V of the plan, however, provides specifically for the appointment of a trustee of the Miami Center Liquidating Trust to Implement the plan.[4] Mr. Gould's attempt to appeal the plan was not successful. *See*

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[2] 11 U.S.C. Section 541(a)(1) includes as estate assets: "Except as provided in subsection (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case."

[3] Article V, Creation of Trust, states:

(1) A Trust is hereby declared and established on behalf of the Debtors effective on the Effective Date and an individual to be appointed by the Court . . . is designated as Trustee of all property of the estates of the Debtors within the meaning of § 541(a) of the Code, including but not limited to Miami Center, the Washington Proceeds, and all claims and causes of Action, if any, of the Debtors . . . to hold, liquidate, and distribute such Trust Property according to the terms of this Plan. The Trust shall be known as the "Miami Center Liquidating Trust."

(2) On the Effective Date, all right, title, and interest of the Debtors in and to the Trust Property, including Miami Center, shall vest in the Trustee, without further act or deed by the Debtors or any other of them, and without the filing or recording of any instrument of conveyance, assignment or transfer, *subject however,* to all existing liens, mortgages, security interests and encumbrances.

[4] *See* note 3, *supra*.

Holywell v. Bank of New York, 59 Bankr. 340. The Liquidating Trustee was appointed by order dated August 12, 1985; that order was not appealed by Mr. Gould or anyone else.

Finally, Mr. Gould asserts that he need not turn over the concrete pumps sale proceeds because the Miami Center Liquidating Trust refuses to pay certain income taxes. The question of whether the Trust must pay taxes is not relevant to the issue of ownership of the concrete pumps. Moreover, the Eleventh Circuit Court of Appeals has determined that the Trust does not have the tax obligations Mr. Gould seeks to impose. *See In re Holywell*, 911 F.2d 5071 [sic] (11th Cir. 1990).

In sum, none of the grounds argued by Mr. Gould demonstrate that he should not be certified to be in contempt. We have conducted a de novo review of the record in this case, as required under Bankruptcy Rule 9033(d). After so doing, we accept the findings of fact and conclusions of law of the Bankruptcy Court. Mr. Gould sold an asset of the Miami Center Liquidating Trust and pocketed the proceeds, without the consent of the Liquidating Trustee and in direct violation of a court order.

The only remaining question is whether Mr. Gould's actions amount to civil or criminal contempt or both. The Bankruptcy Court stated that it was finding Mr. Gould in contempt under Rule 9020(a) and (b) of the Rules of Bankruptcy Procedure. Rule 9020 governs criminal contempt proceedings and indeed, in its order finding contempt, the Bankruptcy Court applied Rule 9020 because when ordered to comply by the Bankruptcy Court on July 27, 1989, Mr. Gould announced in the presence of that

court his intention not to do so.[5] However, the nature of the bankruptcy court Order – imposition of a $1000/day

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[5] Rule 9020 is entitled "Criminal Contempt Proceedings" and provides as follows:

> (a) Contempt committed in presence of bankruptcy judge
>
> Contempt committed in the presence of a bankruptcy judge may be determined summarily by the bankruptcy judge. The order of contempt shall recite the facts and shall be signed by the bankruptcy judge and entered of record.
>
> (b) Other contempt
>
> Contempt committed in a case or proceeding pending before a bankruptcy judge, except when determined as provided in subdivision (a) of this rule, may be determined by the bankruptcy judge only after a hearing on notice. The notice shall be in writing, shall state the essential facts constituting the contempt charged and describe the contempt as criminal or civil and shall state a time and place of hearing, allowing a reasonable time for the preparation of the defense. The notice may be given on the court's own initiative or on application of the United States attorney or by an attorney appointed by the court for that purpose. If the contempt charged involves disrespect to or criticisms of a bankruptcy judge, that judge is disqualified from presiding at the hearing except with the consent of the person charged.
>
> (c) Service and effective date of order; review
>
> The clerk shall serve forthwith a copy of the order of contempt on the entity named therein. The order shall be effective 10 days after service of the order and shall have the same force and effect as an order of contempt entered by the district court unless, within the 10 day period, the entity named therein serves and files with the clerk objections prepared in the manner provided in Rule 9033(b). If timely objections are filed, the order shall be reviewed as provided in Rule 9033.

fine until such time as Mr. Gould complies – is more characteristic of a civil contempt finding.

The Supreme Court has said that the words used by the lower court to describe the contempt are not determinative. *Shillitani v. United States*, 384 U.S. 364, 369, 86 S.Ct. 1531, 1535, 16 L.Ed. 2d 622 (1966). The same actions by a party can amount to both civil and criminal contempt. *United States v. United Mine Workers*, 330 U.S. 258, 299, 67 S.Ct. 677, 698-99, 91 L.Ed. 884 (1947). It is the nature and purpose of the punishment that is determinative. *Id.* at 297, n. 64 (citations omitted), *Hicks v. Feiock*, 108 S.Ct. 1423, 1429-31 (1988). The commonly stated distinction is that "if the penalty is to compensate the complaining party or to coerce the defendant into complying with the court's orders, the contempt is civil, while if the penalty is punitive, intended to vindicate the authority of the court, then the contempt is criminal." *Hubbard v. Fleet Mortgage Co.*, 810 F.2d 778, 781-82 (8th Cir. 1987), *citing United Mine Workers*, 330 U.S. at 302-04. *See also Latrobe Steel Co. v. United Steelworkers of America*, 545 F.2d 1336, 1343 (3rd Cir. 1976). As a result, "the penalties arising out of adjudications of criminal contempt are generally an absolute fine of a specific amount or a determinative period of confinement." *Id.*

While the bankruptcy court found Mr. Gould to be in criminal contempt, it appeared to intend a coercive as well as a punitive sanction. While we adopt the Bankruptcy Court's findings, we now find Theodore B. Gould

to be in *civil* contempt of court.[6] *See Shillitani*, 86 S.Ct. at 1535 (parties had briefed the issues with reference to criminal contempt, but "the contempt orders were remedial, and therefore might well be deemed civil in nature rather than criminal.")

By the order of this Court we direct Mr. Gould to comply fully with the August 1, 1989 Order of the Bankruptcy Court in so far [sic] as it directed him to turn over to the Liquidating Trustee the $67,500 sales proceeds received in the sale of the concrete pumps and related equipment, together with any interest earned on or since the time of the sale, less $1000 in expenses incurred in consummating the sale. Mr. Gould shall comply with the terms of the order of this Court within *seven* (7) days of the date of this order. The failure to comply fully and timely with the Order of this Court shall result in the imposition of sanctions, including but not limited to a daily fine in the amount of $1000 per day for each day Mr. Gould may fail to comply. It is therefore

ORDERED and ADJUDGED that the Motion by Fred Stanton Smith, Trustee of the Miami Center Liquidating Trust, is hereby GRANTED and Mr. Gould is directed to comply with the Order of this Court in the manner prescribed by this Court.

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[6] We take no position *at this time* on the merits of a criminal contempt finding with respect to Mr. Gould.

DONE AND ORDERED at Miami, Florida, this 17 day of May, 1991.

/s/ Stanley Marcus
STANLEY MARCUS
UNITED STATES
DISTRICT JUDGE
SOUTHERN DISTRICT
OF FLORIDA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 89-2629-CIV-MARCUS

THEODORE B. GOULD,

Appellant,

vs.

FRED STANTON SMITH, Trustee of the Miami Center Liquidating Trust,

Appellee.

IN RE: HOLYWELL CORPORATION, et al.,

Debtors.

---/

ORDER DENYING STAY AND REHEARING

(Filed Jun. 25, 1991)

THIS CAUSE comes before the Court upon Appellant Theodore B. Gould's Motions for Stay, Rehearing, and Granting Judicial Notice. For the reasons detailed below, the Motion for Stay is DENIED, the Motion for Rehearing is DENIED, and the Motion for Granting Judicial Notice is GRANTED. By Order entered on May 17, 1991, we granted the Motion by Fred Stanton Smith, the Trustee of the Miami Center Liquidating Trust, and we specifically directed Mr. Gould to comply with the August 1, 1989 Order of the Bankruptcy Court in so far [sic] as it directed him to turn over to the Liquidating Trustee $67,000 [sic] in sales proceeds received in the sale of certain concrete pumps and related equipment, together with any interest earned on or since the time of sale, less $100 [sic] in expenses incurred in consummating the sale. Mr. Gould

was directed to comply with the Order of May 17 within seven days.

Appellant's Motion for Stay is now premised on the granting of a writ of certiorari issued by the Supreme Court on May 28, 1991. The Supreme Court granted certiorari on a lawsuit arising from the same bankruptcy proceedings which are the foundation of the instant case. *See In re Holywell Corporation*, 911 F.2d 1539 (11th Cir. 1990), *cert. granted, Holywell Corp. v. Smith*, 114 L.Ed.2d 476, 59 U.S.L.W. 3793 (1991). On appeal from the bankruptcy court, the federal district court determined that a liquidating trustee was not required by the provisions of a confirmed amended Plan of Reorganization nor by statutory provisions to file tax returns and pay income taxes on the sale of pre-confirmation and post-confirmation properties. The Eleventh Circuit Court of Appeals affirmed the district court. The Supreme Court agreed to consider that question. However, the tax issue, we believe, lies outside the focus of the instant action and the May 17 Order of this Court. As we stated in our Order of May 17, 1991, "[t]he question of whether the Trust must pay taxes is not relevant to the issue of ownership of the concrete pumps." Order at 6. We did *not* premise our contempt order upon the bankruptcy court's "agreement with the trustee that he is not responsible for the payment of the federal income taxes," Appellant's Motion for Stay at 3. Nor did we hold that the bankruptcy court had so premised its certification of contempt. *Id.* Rather, we stated clearly and unambiguously that Appellant was to be held in contempt because "Mr. Gould sold an asset of the Miami Center Liquidating Trust and pocketed the proceeds, without the consent of the Liquidating Trustee

and in direct violation of a court order." *See* Order of May 17, 1991, at 6.

Mr. Gould argues that if the Supreme Court reverses the Eleventh Circuit's determination that the Trust is not responsible for the claimed taxes, and if Mr. Gould then brings an action for breach of fiduciary duty against the Liquidating Trustee for not paying those taxes, and if Mr. Gould then obtains a judgment against the Liquidating Trustee, and if that judgment includes as damages Mr. Gould's attorney's fees in appealing the tax decision, then perhaps he could not be held in contempt for diverting trust proceeds and using the asserts [sic] for his own purposes. Mr. Gould's argument is speculative and hypothetical. Moreover, even if he should prevail as to the tax matter, the underlying realities of the instant action remain the same: Mr. Gould sold a Trust asset, kept the proceeds, and took such action without the consent of the Liquidating Trustee and in direct violation of a court order. It is for these things that he was found in *civil* contempt of court and directed to comply. We have heard nothing new or different and accordingly, we believe the Motion for Stay should be DENIED.

We also note that Mr. Gould has failed to address the ordinary requirements for obtaining a stay. *See Garcia-Mir v. Meese*, 781 F.2d 1450 (11th Cir. 1986). These criteria include: (a) whether the movant has demonstrated a likelihood of success on the merits; (b) whether the movant has made a showing of irreparable injury if the stay is not granted; (c) whether the non-moving party will be injured if the stay is granted; and (d) whether the public interest will be served by granting the stay. All four requirements must be met. Mr. Gould does not meet even

the first. Given that he has admitted that he took the property of the Trust without permission and that he diverted proceeds from the sale of such property for his personal use, he has little likelihood of success on reversing the contempt order. On this basis alone we would deny the motion for stay. In addition, we note that no stay should be granted unless it is conditioned on the posting of a supersedeas bond for the amount of the sale proceeds plus twice the statutory rate of interest. *See* Fed. Rule of Civ. P. 62(d); Fla. R. App. P. 9.310(b)(2); Fla. Stat. §55.03 (1981). *See also Sterling v. Blackwelder,* 405 F.2d 884 (4th Cir. 1969) (appeal from order confirming judicial sale was dismissed as moot for failure to comply with this rule allowing appellant to obtain a stay by giving a supersedeas bond); *United States v. Jenkins,* 153 F. Supp. 636 (S.D. Ga. 1957) (Defendant who appealed from judgment but did not tender supersedeas bond in amount of judgment subjected himself to action brought by plaintiff to enforce judgment while appeal was pending in court of appeals and in the United States Supreme Court.).

We add that Mr. Gould's statement that he cannot comply with the Court's Order because he has used the funds which he was required to return to appeal the tax obligation issue has no bearing on the basis for which Mr. Gould was held in contempt. Furthermore, such representation conflicts directly with those he made in proceedings before the bankruptcy court at which time he stated that the proceeds from the sale of the concrete pumps had been invested "in GMAC 30 day paper at 9.21 percent interest." Transcript from Hearing of Fred Stanton Smith, Trustee, on Motion for Contempt, July 27, 1989, at 63, lines 15-19. At the same hearing, Mr. Gould refused to

identify the brokerage firm at which the account was held. *Id.* at lines 24-25. Mr. Gould next stated that

> I will not turn over the funds until there is a resolution of the trustee's responsibility for the payment of income taxes for the bankruptcy estate since I considered Judge Weaver's decision with respect to the income taxes, that is the Trustee's lack of responsibility, I consider that null and void.

Id. at 64-65. Nowhere does Mr. Gould indicate that he planned to *expend* the very funds at issue to appeal the question the resolution of which he stated would await before turning over the funds. His comments in bankruptcy court almost two years ago illustrate his intention to flout any orders of any court requiring him to return the proceeds of the concrete pump sales. We find no basis in Mr. Gould's Motion for Rehearing to alter our Order of May 17, 1991. Finally, as the above discussion indicated, this Court has taken notice of the grant of certiorari by the Supreme Court in *Holywell Corp. v. Smith*, 911 F.2d 1539.

Accordingly, for the foregoing reasons,

Theodore B. Gould's Motion for Stay is DENIED, his Motion for Rehearing is DENIED, and his Motion for Granting Judicial Notice is GRANTED.

DONE AND ORDERED in Chambers at Miami, Florida, this 25th day of June, 1991.

/s/ Stanley Marcus
STANLEY MARCUS
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

THEODORE B. GOULD, Appellant vs. FRED STANTON SMITH, as Trustee of the Miami Center Liquidating Trust and UNITED STATES OF AMERICA, Appellees.	APPEALS COURT NO. 93-5042 DISTRICT COURT NO. 89-2629-CIV-SM
In Re HOLYWELL CORPORATION, et al., Debtors,	

THEODORE B. GOULD'S
NOTICE OF SUPPLEMENTAL AUTHORITY

Appellant Theodore B. Gould, appearing *pro se*, respectfully requests that this Court take notice of the Supreme Court opinion in *International Union, United Mine Workers of America v. Bagwell, et al.*, No. 92-1625, (June 30, 1994), a copy of which is attached, in support of my argument that the District Court's contempt find payable to the United States, in the amount of $1,331,000.00 plus interest, was a punitive sanction imposed as a

criminal fine to vindicate the authority of the Court in violation of the due process of law.

Respectfully submitted,

THEODORE B. GOULD, pro se
Post Office Box 6279
Charlottesville, Virginia 22906

By /s/ Theodore B. Gould
Theodore B. Gould

EXHIBIT 8

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

Civil Action No. 87-0037-C

TWIN DEVELOPMENT CORPORATION, Plaintiff, v. FRED STANTON SMITH, THE BANK OF NEW YORK and IRVING WOLFF, Defendants.	:	APR 21 1988

ANSWERS OF DEFENDANT WOLFF TO PLAINTIFF'S INTERROGATORIES

COMES NOW the Defendant IRVING M. WOLFF and answers the Interrogatories previously propounded by the Plaintiff as follows:

Answer to Interrogatory 1a.

I represented the Committees of Unsecured Creditors of Miami Center Limited Partnership and Miami Center Corporation.

Answer to Interrogatory 1b.

1. The preliminary issue which had to be addressed in negotiations in connection with the settling of the

Stipulation was the priority of payment to the creditors of Holywell Corporation from the Holywell corporate assets.

2. In addition, if there were any recoveries on behalf of Holywell Corporation resulting from the tax protests (real estate and personal property taxes sought to be collected by Dade County, Florida) filed on its behalf, such recovery would be added to the fund to be made available to the other creditors. However, a concession had to be made to The Bank of New York (the Bank), reserving to the Bank its right to dismiss or settle the tax protests.

3. Holywell creditors were to be entitled to an immediate distribution from the Holywell assets, or such creditors' claims had to be reserved before distribution from Holywell assets to creditors of the other Debtors. All distributions would be in respect to undisputed claims; disputed claims would be reserved for.

4. An order would be obtained from the Bankruptcy Court to permit the Liquidating Trustee to pay all undisputed claims on or before forty-five (45) days after the Effective Date of the Plan. Hence, all allowed claims would be paid with interest at the full legal rate, if available in the liquidating fund, provided such interest would be paid ninety (90) days after the payment of principal. However, with the reserve for disputed Holywell claims and the availability of funds, it was apparent that the principal amount of the claims and interest could be paid simultaneously.

5. With the entry of the order approving the Stipulation by the Bankruptcy Court, the Committees that I

represented would withdraw their objections to confirmation of the Bank's Plan, and at that time the Stipulation provided that confirmation could not be delayed beyond May 31, 1985.

Answer to Interrogatory 1c.

1. Since the Plan provided that confirmation was to be obtained on or before May 31, 1985, the confirmation date had to be extended, and it was extended beyond May 31, 1985.

2. The Effective Date as described in the Bank's Plan had to be redefined so that payment could commence after confirmation, providing there were no stays obtained or rehearing motions pending.

Answer to Interrogatory 2a.

1. In accordance with Judge Britton's finding as contained in the Order of December 31, 1984 (paragraph (c), page 2), the estate was charged with protecting the United States of America's (Internal Revenue Service) claim in the following language:

> It will be necessary for Holywell to continue to provide these services until such time as the affairs of these companies, their partners and limited partners are terminated and all obligations to the Internal Revenue Service are determined and paid.

The Liquidating Trustee and his counsel were not familiar with the ramifications of the transfer of title to the Bank or its nominee in connection with any income tax that

could be assessed or be due and owing, and since there was no guidance in the confirmed Plan for the reservation for or payment of such taxes, if any, and no provision was made in the Plan for repayment of the superpriority loans, indemnification was obtained from the Bank in connection with these exposures, because the Bank insisted that the Liquidating Trustee execute the transfer documents on behalf of the Liquidating Trust and as Liquidating Trustee.

2. Indemnification was also sought because the Confirmation Order found the Bank to be an undersecured creditor, and in the closing adjustments the Bank took credit for post-filing interest in the amount of $27,050,115.

3. In addition, the December 11, 1984 Order, as corrected by the December 31, 1984 Order, recognized that the Bank had a first lien on all of the net proceeds due Gould and Holywell from the sale of the Washington Properties. Under the procedures at the closing, the Bank released its lien on the full amount of the proceeds of sale of the Washington Properties, and in accordance with the terms and provisions of the confirmed Plan, the entire $30 million net proceeds were made available to pay unsecured creditors, although the Cash Collateral Order limited the Bank's lien to a dividend distribution in liquidation of the assets of the nonfiled corporate subsidiaries. Though the proceeds due the unfiled subsidiaries from the net proceeds of the Washington Properties were not assets of the estate, the Bank's Plan subordinated the claims of the unfiled subsidiaries. The unfiled subidiaries did not and were not required to file claims in the Chapter 11 proceedings because they were not creditors of the

filed Chapter 11 Debtors. They claimed independent assets, i.e., their portion of the cash earned in the sale of the Washington Properties, free and clear of the Bank's lien.

4. The confirmed Plan provided for a Funding Agreement and Certificates of Indebtedness to be issued by the Liquidating Trust and the Liquidating Trustee. At the closing on October 10, 1985, these two instruments were amended and altered, without court order, notice of hearing, or affording parties the right to object (including but not limited to Olympia & York Florida Equity Corp., Miami Center Joint Venture and any of the Debtors). This amendment allowed the Bank to obtain Certificates of Indebtedness from the Miami Center Liquidating Trust if the Bank used sources other than an advance to the Liquidating Trustee, i.e., a payment required by the bond posted in accordance with the order entered by Judge Atkins in the appeal pending before him.

5. Because of the conflict between the terms of the confirmed Plan and the December 31, 1984 Order, and for the other matters herein alluded to, indemnification was obtained.

Answer to Interrogatory 2b.

The Bank and its representatives insisted that Fred Stanton Smith, as Liquidating Trustee, execute the documents effectuating the transfer of the assets from the Miami Center Liquidating Trust to The Bank of New York. To save the Liquidating Trustee harmless as a result of the execution of the contract by him as Liquidating Trustee, we obtained the letter of indemnity so that if any

claims were made upon the Liquidating Trustee for payment of unpaid taxes, i.e., Internal Revenue Service claims, which would result from the sale and transfer of the property at the closing, the question and payment of the allowed superpriority claims, the accountability to the unfiled subsidiaries, and the question of the charging of post-bankruptcy interest, the Liquidating Trustee would be completely indemnified and saved harmless from such exposure.

Answer to Interrogatory 3.

I do not recall whether I attended.

Answer to Interrogatory 4a.

In an attempt to minimize the Liquidating Trustee's exposure for continued interest charges, I obtained on behalf of the Liquidating Trustee the consent of the Bank to pay the accrued interest on the actual claims, and because of the administration expenses, I recommended to the Liquidating Trustee that one check be cut for each creditor, which would include the amount of the claim plus 90 days accrued interest.

Answer to Interrogatory 4b.

Simultaneously.

Answer to Interrogatory 4c.

Yes.

Answer to Interrogatory 4d.

I sought approval and it was given.

Answer to Interrogatory 4e.

Yes.

Answer to Interrogatory 4f.

Approximately $1.4 million.

/s/ Irving M. Wolff
IRVING M. WOLFF, in Pro Se
HOLLAND & KNIGHT
1200 Brickell Avenue
Post Office Box 015441
Miami, Florida 33101
Telephone: (305) 374-8500

IN THE UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NOS.: 84-01590-BKC-PGH
84-01591-BKC-PGH
84-01592-BKC-PGH
84-01593-BKC-PGH
84-01594-BKC-PGH

CHAPTER 11

In re:

HOLYWELL CORPORATION,
MIAMI CENTER LTD. PARTNERSHIP,
MIAMI CENTER CORPORATION,
CHOPIN ASSOCIATES, and
THEODORE B. GOULD,

Debtors.

ORDER ON DEBTORS' [sic] MOTION FOR REIMBURSEMENT OF ACCOUNTING EXPENSES

/

(Filed March 9, 1994)

This matter came before the Court on January 18, 1994 on the Debtors' [sic] motion for reimbursement of accounting expenses, and the Court having considered the motion, the evidence presented and argument of the parties, and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED:

1. The discharged Debtors [sic] seek reimbursement of approximately $1.8 million in accounting expenses

incurred post-confirmation. The Trustee of the Miami Center Liquidating Trust and The Bank of New York object on grounds that there is no legal or factual basis for reimbursement of these fees; that the accounting fees sought are excessive; that the accounting services were done for the benefit of the discharged Debtors and not for the Trust; that the accounting work was flawed and could not be entirely relied upon by the Trust; and that the Debtors are barred from any recovery because they appear before the Court with unclean hands.

2. Reimbursement is sought by the Debtors [sic] on the grounds that the work done was for the purpose of maintaining their post-confirmation records in order to provide the Internal Revenue Service with information used in the preparation of both the preliminary and final revenue agent's reports of the tax obligations of the Miami Center Liquidating Trust, Holywell Corporation and its subsidiaries, and the bankruptcy estate of Theodore B. Gould.[1]

3. A brief statement of the history of these proceedings is necessary in order to make clear the Court's determination of the pending motion. The bank proposed

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[1] The Court notes that as to Mr. Gould's estate, two tax returns were due: one from the August 1984 petition date to December 31, 1984, when he was a debtor-in-possession, and one from January 1, 1985 through October 10, 1985, the plan's effective date. On that date, the Trustee took possession of Debtor Gould's assets. Mr. Gould, while a debtor-in-possession, did not file the return due December 31, 1984. January 19, 1994 Transcript at 297. The Trustee did not file the return due the following year, but settled the amount of taxes owed after the Supreme Court's tax decision.

and the Court confirmed a plan of reorganization which substantively consolidated the Debtors, placed all of their assets as defined by Bankruptcy Code § 541(a) into a trust called the Miami Center Liquidating Trust ("Trust"), and provided for the appointment of a Trustee to administer the Trust. Trust assets included the proceeds from the pre-confirmation sale of realty known as the Washington properties, and the proceeds from the post-confirmation sale of the Miami Center property.

4. The plan did not provide information regarding the income tax consequences of the plan's consummation. Although the Debtors objected to certain tax effects of the plan, they introduced no evidence in support of that objection. Bankruptcy Judge Britton specifically called upon the Debtors to provide such proof and indicated, if needed and proper, that the Court would modify the plan in an effort to reduce the tax obligations. No such proof was offered.[2] Findings of Fact and Conclusions of Law on the Debtors' Counterclaims, etc., at 3, *Smith v. Bank of New York*, Adv. No. 87-0627 slip op. (Bankr. S.D. Fla. Sept. 30, 1993). The Debtors appealed the confirmation order, but were unsuccessful.

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[2] The Debtors' former counsel filed an affidavit shortly before the hearing on this matter stating that no evidence was presented on the 1985 tax objection to the plan because the Debtors were unable to determine what the tax consequences of the plan would be. Nothing in the record shows that the Debtors advised the Bankruptcy Court, the parties, or the appellate courts of this. The record reflects only that prior to confirmation, the Debtors told the Court a liquidation of their assets would result in millions of dollars in taxes, but failed to provide any proof or detail.

5. In 1987, the Trustee filed adversary complaint no. 87-0627, seeking a declaration of the Trust's tax obligations and the bank's responsibilities for any such payment. This Court, the district Court and the court of appeals held the Trustee had no duty to file returns or pay the taxes at issue. In February 1992, the United States Supreme Court reversed and held the Trust responsible for the tax consequences of the plan.

6. Prior to this ruling, the Internal Revenue Service ("IRS" or "Service") issued a preliminary report on Holywell and its subsidiaries, claiming taxes of over $30 million from the Trust based upon the information supplied by the Debtors and their accountant. The Service asserted claims for interest and substantial penalties. Following the Supreme Court's decision, the Service issued final reports on Holywell and its subsidiaries, the bankruptcy estate of Mr. Gould, and the Trust, seeking even more money. These final reports were also based upon information supplied by the debtors. All of those claims were settled for $13.3 million, based upon the work performed by the Trustee's professionals, with financial and accounting support also furnished by the bank.

7. As the basis for the Debtors' [sic] claim for reimbursement of $1.8 million in accounting expenses from 1987 through 1991, the Debtors [sic] contend these monies were spent to maintain the accounting records of the discharged Debtors and their affiliates, and to determine the tax obligations owed by the Trust. All of this money was spent, they say, on records-keeping and not on the preparation of any tax returns. January 19, 1994 Transcript at 299.

8. It is undisputed these services were not done at the Trustee's request. The discharged Debtors performed the work at issue of their own volition. No interim bills were sent to the Trustee, and this Court's permission was never sought or obtained during the five years the services were allegedly performed. The Debtors and their accountants independently met with the IRS and assisted the Service in the preparation of a preliminary report on Holywell Corporation and its subsidiaries, and the final reports issued as to tax obligations of Holywell, the Trust, and Mr. Gould's bankruptcy estate. Presumably the Debtors' records were used for these purposes, as well.

9. The Trustee's expert witness[3] testified that the accounting work done by the Debtors contained substantial flaws requiring the Trustee's accountant to make major adjustments in order to calculate the correct amount of tax due; that it was these flawed accounting records which were the basis upon which the IRS sought many millions of dollars more than the Trustee believed to be due. As noted, the Internal Revenue Service's claims were ultimately settled for a fraction of the sums originally claimed. *See* January 18, 1994 Transcript at 254-263.

10. The Trustee's counsel has previously advised the Court that the work done by the Debtors in segregating or allocating the substantively consolidated Trust assets and income among the various Debtors was necessary to a determination of the taxes and was used by the Trustee in reaching a settlement with the tax authorities.

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[3] John Shaub, C.P.A., of Arthur Andersen & Co., was one of the professionals principally involved in assisting the Trustee in tax matters.

The Trustee acknowledges that if the Debtors had not done the allocations, the Trustee would have had to have done so in order to determine his tax obligations. However, the Trustee's expert witness testified that the number of hours and amount of money billed by the Debtors for the allocations was grossly excessive. *Id.*

11. Arthur Andersen & Co., the Trustee's accountant since confirmation, had the responsibility of preparing and filing monthly reports of receipts and disbursements for the Trust. *Id.* at 255. During this period, from 1987 to 1991, the Trust had an average of approximately fifty disbursements per year, each of which was accounted for in the monthly reports. The income consisted almost entirely of interest on accounts. *Id.* at 256-257. Mr. Shaub testified that it should have taken no more than four hours each month to allocate the interest and other income, and the. expenses and disbursements to each of the Debtors, and no more than approximately forty hours a month to maintain separate ledgers for each Debtor. *Id.* at 257. He testified that the accounting transactions involved were basic, that an experienced bookkeeper or entry level C.P.A. should have been able to handle the work, and that $75.00 was a reasonable hourly rate for the work done. At 500 hours per year, this comes to $37,500. *Id.* at 258-259. The Debtors seek an average of $450,000 for each year for the work they did.

12. The Court notes that from mid-1988 through early 1991, there was a stay imposed against disbursements of Trust assets. January 19, 1994 Transcript at 305. Obviously, then, during that period the transactions to be accounted for were nominal. The Debtors nonetheless

claim entitlement to reimbursement for the full salaries paid to their employees during that period.

13. The evidence is undisputed that the Debtors' accounting work was done by their own employees and not by outside accountants. *Id.* at 291-294. The salaries paid come to a blended hourly rate of $130. This figure appears to include Social Security and withholding taxes, etc., but it cannot be determined if it included employee benefits. The employees listed as having performed the work include secretarial and bookkeeping staff, as well as certified public accountants and an attorney. None of the persons who actually performed any of the accounting services appeared before the Court to testify as to the nature of their work. The evidence came only from Debtor Gould, and he did not do any of the work in question.

14. While the claim is that these employees devoted *all* of their time to maintaining the records in order for the discharged Debtors to segregate post-confirmation income and expenses, *id.* at 300, the evidence shows this is not true. These employees also performed services entirely unrelated to records-keeping or determining the tax obligations ultimately imposed by the Supreme Court on the Trust on behalf of Holywell and its affiliates, the bankruptcy estate of Mr. Gould, and the Trust itself. *Id.* at 300, 306-308, and 312-313.[4] The fact that there was a stay

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[4] These unrelated services included legal advice, accounting services for a joint venture in which Debtor Gould has an interest, and assisting in the resolution of Debtor Miami Center Limited Partnership's limited partners' tax disputes with the IRS. *Id.*

during some two and one-half years of the application period and that the discharged Debtors were engaged in continuing legal battles with the bank and the Trust belies the claim that the employees did nothing but prepare records.

15. The Court finds the Debtors' claim that their staff devoted full time to records-keeping for the period 1987-1991 is simply not credible. Based on the evidence before the Court, the Debtors' employees devoted 2,000 hours per year to the work at issue here – that is almost 40 hours a week for the full year. During this time, no tax returns were prepared from any of these records for any of the Debtors, their affiliates, the Trust or the bankruptcy estate of Mr. Gould. Disbursements of Trust assets, which is what the Debtors' employees were supposed to be accounting for, was stayed from mid-1988 through early 1991. Moreover, there was evidence that the employees were performing services for the discharged Debtors' affairs that were wholly unrelated to records-keeping. Given these facts, the number of hours and amounts claimed by the discharged Debtors is excessive.

16. In addition, the application for reimbursement does not conform to the requirements of Administrative Order 92-7, which governs fee applications. The Court determines that this Order applies to the instant request for reimbursement. The application does not provide time broken out by category; it does not provide time broken out in tenths of hours; and it does not allocate time as required.

17. Upon the foregoing, the Court concludes there is neither a legal nor a factual basis for reimbursing the

discharged Debtors for these accounting expenses. The Trustee did not request these services. There is no agreement of any kind between the Trustee and the Debtors for the work performed. The plan of reorganization does not provide for such services. The plan authorizes the Trustee, and not the discharged Debtors, to retain professionals to assist in administering the plan. Plan, Art. V ¶ 3(o).

18. In addition, there appears to be no statutory or decisional authority which provides for payment under the circumstances of this case. The work performed was clearly for the discharged Debtors' own benefit and interest and, according to the Trustee, when he attempted to use it, major adjustments had to be made because the records contained substantial errors which were prejudicial to the Trust. The term "benefit" is ordinarily defined to mean "something promoting or enhancing well-being: advantage." Webster's II Dictionary at 166 (1984). The evidence demonstrates that the interest of the Trust were neither promoted nor enhanced by the accounting work. It was the interests of the discharged Debtors which were. Therefore, the Court finds that the accounting work did not benefit the Trust or the Debtor's estates except as provided below.

19. Until the decision of the Supreme Court, the Trust was under no duty to determine the amount of taxes due.[5] After that ruling, the Trustee's professionals

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[5] Prior to the Supreme Court's tax decision. this Court rejected efforts by the Debtors and their subsidiaries to compel the Trustee to segregate the substantively consolidated assets of the Trust. *See* Docket Nos. 1963, 1964, 1965 and 1966.

performed all of the work necessary for the Trust to calculate and resolve these obligations. Accordingly, there is no legal basis for imposing the accounting expenses of the discharged Debtors on the Trust.

20. The Court finds that the accounting services performed by the discharged Debtors' employees was primarily for the discharged Debtors' own benefit.

21. The Court notes that the Debtors seek reimbursement for work done beginning in 1987 – two years after confirmation of the plan which substantively consolidated their assets and deposited those assets into the Trust. That date coincides with the date the Debtors first began asserting that the Trustee was liable for the tax consequences of the plan.[6] *See* Findings of Fact and Conclusions of Law on the Debtors' Counterclaims, etc., at 3, *Smith v. Bank of New York,* Adv. No. 87-0627 slip op. (Bankr. S.D. Fla. Sept. 30, 1993). Until 1987, the Debtors represented to the Trustee that they were responsible for the taxes. *Id.* Second, it appears the Debtors were striving to keep the taxes as high as possible. This is evidenced, for example, by the manner in which the Debtors accounted. for their claims for repayment of the "superpriority" loans and the C&D leases of Holywell Telecommunications Co. and Holywell Leasing Co. The Debtors booked these claims as having actually been repaid to the Debtors and their subsidiaries even though they have not been repaid, in conformance with court orders to which

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[6] Pursuant to Court order, the Trustee was required to pay the Debtors' payroll and operating expenses for a short time following confirmation.

the Debtors and their affiliates were parties.[7] This phantom income had the effect of increasing the tax liability. Further evidence of the Debtors' self-interest is the fact that after the Supreme Court's ruling, Mr. Gould filed an application for reward with the IRS by which he sought to receive payment for having provided assistance to the Service. January 18, 1994 Transcript at 260-261.

22. Lastly, the Court notes that the Debtors appear before the Court with unclean hands. This is evidenced by the application for reward, and that while the Debtors' claimed to the IRS and the courts that the Trust owed more than $30 million in taxes, the Debtors had prepared their own internal memorandum calculating the amount of taxes due to be only $9 million. *Id.* at 259-260

23. There is also unrebutted proof that the Debtors discarded pertinent business records without notice to the Trustee prior to making those documents available, and at a time when the Debtors asserted the Trustee was liable for the greater amount of taxes. January 18, 1994 Transcript at 259. The Trustee deemed those records both relevant and necessary to his determination of the taxes, and he was prejudiced by the failure to have them available.

24. As an additional basis for denial of the motion, the Court notes that there are two unsatisfied contempt

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[7] *See Holywell Telecommunications Co. v. Bank of New York*, No. 87-1786 slip op. (S.D. Fla. February 27, 1989); *Holywell Telecommunications Co. v. Bank of New York*, No. 85-3431 slip op. (S.D. Fla. May 24, 1989); *Bank of New York v. Holywell Corp.*, No. 87-970 slip op. (S.D. Fla. November 4, 1988).

judgments against Debtor Gould for having misappropriated Trust assets. They involve the sale of Trust property and the refusal to turn over the net proceeds. One judgment is in favor of the Trustee for $67,000 [sic], plus interest, and the other is in favor of the United States of America for $1 million. *See Smith v. Gould*, No. 89-2629 slip op. (S.D. Fla. August 31, 1993). In another proceeding related to these cases, the Trustee and the bank recovered over $150,000 from the Debtors and their attorney in Virginia for contumacious violations of the Court's orders. *See Holywell Corp. v. Smith*, No. 88-0628 slip op. (S.D. Fla. October 25, 1990). There can be no justification for reimbursement to Debtors who appear before the Court having disobeyed its prior orders.

25. Nonetheless, the Trustee has acknowledged reliance on a portion of the work done by the Debtors [sic] in apportioning income among the various taxable entities, to the extent that adjustments did not have to be made. The Court, therefore, will award reimbursement to the Debtors [sic] to that extent only. The Court finds that a reasonable fee for the work performed is $20,000 a year for three years, and $5,000 a year for the period the stay was in effect. For the five-year application period of 1987 through 1991, this comes to a total of $70,000.

27. In determining this sum, the Court has considered all of the factors set forth in Administrative Order 92-7 and the applicable case law. *See Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974); *In re First Colonial Corporation of America*, 544 F.2d 129 (5th Cir. 1977). The sum awarded takes into consideration,

a. a reasonable amount of time and labor;

b. the lack of novel or difficult questions;

c. that the work could have been performed by an experienced bookkeeper or junior C.P.A.;

d. that the Debtors may not be reimbursed for ordinary secretarial staff, no matter under what guise;

e. that the Trustee had to make substantial adjustments to the accounting records; and

f. the apparent effort by the Debtors to increase the tax liability.

28. Given the totality of these facts and under all of the circumstances, the Court awards the Debtors $70,000 as reimbursement of their accounting expenses for the period 1987 through 1991. This sum shall be set off against all sums due the Trustee by the Debtors.

DONE AND ORDERED in Miami, Dade County, Florida, this 9 day of March, 1994.

/s/ Paul Hyman
PAUL G. HYMAN
UNITED STATES
BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In re:	Case Nos.
HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, and THEODORE B. GOULD, Debtors	84-01590-BKC-PGH 84-01591-BKC-PGH 84-01592-BKC-PGH 84-01593-BKC-PGH 84-01594-BKC-PGH Chapter 11

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ORDER DENYING APPLICATION OF ARNOLD & PORTER FOR INTERIM ALLOWANCE AND PAYMENT OF FEES AND REIMBURSEMENT OF EXPENSES

THIS MATTER came before the Court for hearing on January 18, 1994, upon the Application of Arnold & Porter for Interim Allowance and Payment of Fees and Reimbursement of Expenses (the "Application"), filed by Arnold & Porter ("A&P"), counsel for Holywell Corporation, Miami Center Limited Partnership, Miami Center Corporation, Chopin Associates, and Theodore B. Gould ("Gould") (collectively, the "Debtors" or "Discharged Debtors"). Adequate notice was given. Having considered the Application; the Trustee's Response to Application of Arnold & Porter for Interim Allowance and Payment of Fees and Reimbursement of Expenses, filed by Fred Stanton Smith, as Trustee of the Miami Center Liquidating Trust (the "Trustee"); the Objections to "Application of Arnold & Porter for Interim Allowance

and Payment of Fees and Reimbursement of Expenses", filed by The Bank of New York; the Response of Arnold & Porter in Support of Application for Interim Allowance and Payment of Fees and Reimbursement of Expenses; and the Supplemental Submission of Arnold & Porter in Support of Application for Interim Compensation; having heard argument of counsel for the Debtors, the Trustee, the Bank, and of Gould pro se; having considered the exhibits, the testimony of Dennis Lyons, Esq., and the record, and being otherwise fully advised in the premises, the Court finds good cause to deny the request for allowance and payment of the fees and costs from the Liquidating Trust. Accordingly, it is hereby

ORDERED and ADJUDGED that the Application is DENIED in its entirety for the reasons stated in the Findings of Fact and Conclusions of Law Denying Application of Arnold & Porter for Interim Allowance and Payment of Fees and Reimbursement of Expenses entered on even date herewith. A&P shall not receive any payment from the Liquidating Trust as compensation for services or reimbursement of expenses.

DONE and ORDERED at Miami, Florida, this 9 day of March, 1994.

/s/ Paul Hyman, Jr.
Paul G. Hyman, Jr., Judge
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

Case Nos. 84-01590-BKC-PGH
84-01591-BKC-PGH
84-01592-BKC-PGH
84-01593-BKC-PGH
84-01594-BKC-PGH

In re:

HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, and THEODORE B. GOULD,

Chapter 11

Debtors.
_____/

FINDINGS OF FACT AND CONCLUSIONS OF LAW DENYING THE APPLICATION OF ARNOLD & PORTER FOR INTERIM ALLOWANCE AND PAYMENT OF FEES AND REIMBURSEMENT OF EXPENSES

THIS MATTER came before the Court for hearing on January 18, 1994, upon the Application of Arnold & Porter for Interim Allowance and Payment of Fees and Reimbursement of Expenses (the "Application"), filed by Arnold & Porter ("A&P"), counsel for Holywell Corporation, Miami Center Limited Partnership, Miami Center Corporation, Chopin Associates, and Theodore B. Gould ("Gould") (collectively, the "Debtors" or "Discharged Debtors"). Adequate notice was given. Having considered the Application; the Trustee's Response to Application of Arnold & Porter for Interim Allowance and Payment of Fees and Reimbursement of Expenses (the

"Trustee's Response"), filed by Fred Stanton Smith, as Trustee of the Miami Center Liquidating Trust (the "Trustee"); the Objections to "Application of Arnold & Porter for Interim Allowance and Payment of Fees and Reimbursement of Expenses" (the "Bank's Objections"), filed by The Bank of New York (the "Bank"); the Response of Arnold & Porter in Support of Application for Interim Allowance and Payment of Fees and Reimbursement of Expenses (the "A&P Response"); and the Supplemental Submission of Arnold & Porter in Support of Application for Interim Compensation (the "Supplement"); having heard argument of counsel for the Debtors, the Trustee, the Bank, and of Gould pro se; having considered the exhibits, the testimony of Dennis Lyons, Esq., and the record, and being otherwise fully advised in the premises, the Court finds good cause to deny the request for allowance and payment of the fees and costs from the Liquidating Trust. Accordingly, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

Background

1. On August 22, 1984, the Debtors filed separate voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. Subsequently, the Debtors' individual cases were substantively consolidated.

2. On August 8, 1985, this Court confirmed the Amended Consolidated Plan of Reorganization, proposed by the Bank (the "Plan"). The Effective Date of the Plan was October 10, 1985. Under the terms of the Plan, the

Miami Center Liquidating Trust (the "Liquidating Trust" or "Trust") was established and the Trustee was appointed to liquidate the assets of the Liquidating Trust and disburse the proceeds to creditors. This Court, and thereafter, the District Court and the Eleventh Circuit, found that the Plan was "substantially consummated" by early 1986.

3. From the Effective Date to the present, the Trustee has properly performed his duties under the Plan.

4. More than eight years after the Effective Date of the Plan, on December 13, 1993, A&P filed the Application in which it seeks allowance and payment from the Liquidating Trust of $742,316.25 for services rendered postconfirmation on behalf of the Discharged Debtors and $104,024.59 for expenses for the period from October 1990 through May 1992 (the "Application Period"). The Application Period commenced more than three years after the Effective Date. In the A&P Response, A&P voluntarily reduced the amount requested as reimbursement of expenses to $97,309.79. The total fees and costs sought by A&P from the Liquidating Trust is now $839,626.04.

The Services Provided BV A&P

5. During the Application Period, A&P represented the Discharged Debtors in three matters:

(1) a petition for writ of certiorari to the Supreme Court from a judgment by the Eleventh Circuit, which held that the Trustee did not have an obligation to file

tax returns and to pay federal and state income taxes (the "Tax Case");

(2) a petition for writ of certiorari to the Supreme Court from a decision of the Eleventh Circuit, which held that the Plan, which provided the Bank with a credit for postpetition interest, was not subject to appellate review under the mootness doctrine (the "Mootness Case"); and

(3) an appeal to the District Court from this Court's order authorizing the Trustee to issue to the Bank a trustee's certificate (the "Trustee's Certificate"), pursuant to an amendment to the Plan (the "Trustee's Certificate Case").

Application, at ¶¶ 13-15.

6. The terms of A&P's retention by the Discharged Debtors are set forth in a detailed letter agreement dated October 26, 1990 (the "Retainer Letter'), which provided that A&P would present to the Discharged Debtors monthly statements for services and disbursements, and that "payment therefor shall be made promptly upon receipt." Application, at Ex. 5. Furthermore, A&P required both that the Discharged Debtors pay an initial retainer against which A&P would charge fees and disbursements, and that the Discharged Debtors replenish the retainer in advance as a condition to A&P's continued representation of the Discharged Debtors. *Id.*

7. Now, long after substantial consummation of the Plan, having been retained by the Discharged Debtors,

A&P seeks compensation from the Liquidating Trust[1] for services it provided to the Discharged Debtors in three matters, as follows:

(a) Tax Case – $546,008.75/fees and $76,874.73/costs;

(b) Mootness Case – $64,468.75/fees and $5,838.59/costs; and

(c) Trustee's Certificate Case – $131,838.75/fees and $14,596.47/costs.

The Tax Case

8. In the Tax Case, in a petition for writ of certiorari to the Supreme Court, A&P on behalf of the Discharged Debtors, together with counsel for the United States Internal Revenue Service (the "IRS") and the Solicitor General, succeeded in reversing the Eleventh Circuit's decision that the Trustee did not have to file tax returns or pay state or federal income taxes.

9. A&P's "success" in the Tax Case, however, imposed a large tax liability on the Liquidating Trust. The result of A&P's "success" on behalf of the Discharged Debtors is a decreased distribution to creditors. Clearly such a result is not a "benefit" to the estate; the only

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[1] Although the Application contained a schedule of expenses by matter, *see* Application, at ¶ 16, the A&P Response reduced the total expenses to $97,309.79 without allocating the reduction to the individual matters. Therefore, the Court allocated to each matter the same percentage of the reduced expenses as that of the original expense amounts.

benefit accrued to the taxing authorities and the Discharged Debtors, who otherwise would have been personally liable for the taxes.[2]

10. A&P's efforts resulted in a diminution of the amount in the Liquidating Trust that will be left for distribution to unsecured creditors. Adding a claim for federal and state taxes in excess of $15 million is hardly a beneficial result from the perspective of the creditors relying on the assets of the Liquidating Trust to pay their claims. A&P's rationale that its services provided in the Tax Case were a benefit, "not only to the Debtors, but to the public fisc and to the proper administration of the Trust," Application, at ¶ 35, misses the point. A benefit to the public fisc is not a material benefit to the Liquidating Trust, and it is only benefit to the Trust that is relevant when considering whether A&P should receive payment from the Liquidating Trust.

11. Furthermore, A&P's efforts did not prevent the Trustee from, "evading the payment of lawful taxes." Application, at ¶ 35. The Trustee properly relied upon decisions of the Bankruptcy Court, the District Court, and the Eleventh Circuit – all holding that the Trustee was not obligated to file returns and pay taxes. The Liquidating Trustee acted in a reasonable and responsible manner in not filing returns or paying taxes for which he had at the

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[2] The Court observes that by prosecuting an appeal, the benefit of which could only accrue to them personally, the Discharged Debtors acted in a manner inconsistent with their continuing fiduciary duties to creditors under the Bankruptcy Code.

time, no legal obligation. A&P, with the benefit of hindsight, cannot therefore fairly prevail on the notion that its efforts were necessary for the proper administration of the Liquidating Trust.

12. The imposition upon the Liquidating Trustee of the obligation to file and pay federal taxes only benefited the Discharged Debtors. A&P too liberally interprets the concept of "benefit" when it asserts that its efforts were necessary for "the proper allocation of the funds among the [trust] beneficiaries." A beneficiary of a trust, even a residual beneficiary, is not "benefited" by the imposition of a $15 million federal tax obligation on the Trust. The Discharged Debtors benefited – not as residual beneficiaries of the Trust, but as individual taxpayers who have been relieved of their duty to pay taxes.

13. The Discharged Debtors are the proper parties from which A&P should seek payment, as set forth in the detailed Retainer Letter among them. Application, at Ex. 5. After the Eleventh Circuit affirmed the decision of the Bankruptcy Court that the Trustee did not have an obligation to file tax returns or pay taxes, the Discharged Debtors were faced with a tax problem of no small magnitude. A&P admits that the Eleventh Circuit's decision meant that the tax burden was solely "a personal tax liability problem" of the Discharged Debtors, not the burden of the Trustee. Confronting a large, personal tax obligation, the Discharged Debtors retained the services of A&P in an attempt to lift the tax obligation from their backs onto the backs of the creditors relying on the assets of the Liquidating Trust.

14. From day one, therefore, A&P represented exclusively the interests of the Discharged Debtors. The A&P Retainer Letter evidences this fact in that only Gould signed the letter, solely on behalf of the Discharged Debtors. Application, at Ex. 5. In fact, the A&P retainer letter is void of any reference whatsoever as to the representation by A&P of the Trustee or the Liquidating Trust. Application, at Ex. 5. It is undisputed that the Trustee was not a party to the Retainer Letter and was not informed of its terms until A&P filed the Application. Not only did A&P not represent the interests of the Trustee, the Liquidating Trust, or the creditors relying on the Liquidating Trust, A&P served a master whose interests were directly adverse to their interests. In this regard, A&P never sought authorization from the Bankruptcy Court nor the Trustee to render services on behalf of the Trust. Only after filing the Application, did A&P bother disclosing the terms of the A&P retainer letter to either the Trustee or the Bankruptcy Court. The fact that A&P never presented any of the twenty monthly invoices to the Trustee shows that A&P believed that it represented exclusively the Discharged Debtors. A&P did not render services to the Trustee or for the benefit of the Liquidating Trust.

15. Additionally, the services rendered by A&P in the Tax Case duplicated the efforts of the IRS and the Solicitor General. A&P concedes that the Solicitor General obtains review by the Supreme Court 80% of the time, compared to 3% for private litigants. The federal government was a party from the inception of the Tax Case. When the Solicitor General filed the petition for writ of certiorari, not only was the petition granted, but also it

was the Solicitor General, not A&P, that presented oral argument to the Supreme Court, as the Supreme Court declined to permit A&P oral argument. The services provided by A&P merely complemented, and in some instances outright duplicated, the efforts of the government, which A&P claims to have "awakened". While providing the government with services that are functionally equivalent to a "wake-up call" may benefit the government, the Trust should not be required to pay for such services, and, in any event, $622,883.48 is an exorbitant price for an alarm clock.

The Mootness Case

16. The Trustee filed an adversary complaint to determine whether the Bank was entitled to postpetition interest. The Bankruptcy Court held that the Bank was entitled to postpetition interest under a provision in the confirmed and substantially consummated Plan which expressly allowed the Bank a credit for postpetition interest. On appeal, both the District Court and the Eleventh Circuit held that the issue was not subject to review under the mootness doctrine. It was only then, after two unsuccessful appeals, that A&P became involved for the benefit of the Discharged Debtors.

17. A&P, on behalf of the Discharged Debtors, attempted to obtain review by the Supreme Court. Before A&P began representing the Discharged Debtors, in this collateral attack, both the District Court and the Eleventh Circuit had already held that the Plan had been substantially consummated, and, therefore, the Debtors' objections to this issue were moot and not subject to appellate

review. Undaunted, A&P researched, drafted, finalized, and filed a petition for writ of certiorari and a reply brief in support of the petition. The Supreme Court denied the petition.

The Trustee's Certificate Case

18. Creditors overwhelmingly voted to accept the Plan pursuant to the provisions of Chapter 11 of the Bankruptcy Code. In casting their ballots for the Bank's Plan, the creditors of the Debtors' estates not only expressed their agreement that the Trustee should administer the assets of the Liquidating Trust, but also implicitly expressed a lack of confidence in the abilities of the then Debtors-in-Possession to manage the assets which became part of the Liquidating Trust. This Court confirmed the Bank's Plan, and the confirmation Order was upheld on appeal.

19. The Plan vested solely and exclusively in the Trustee the responsibility for managing the assets of the Liquidating Trust, as well as the duty to act on behalf of the creditors and beneficiaries of the Liquidating Trust. Under the express terms of the Plan, the Discharged Debtors no longer had the authority to act on behalf of the estate, and in fact have not done so, having instead pursued the Tax Case to the detriment of all creditors, other than themselves and the taxing authorities.

20. In pursuing their own interests, the Discharged Debtors also opposed this Court's decision which authorized the Trustee to issue to the Bank the Trustee's Certificate as provided for in the Second Amendment to the Plan.

21. The Second Amendment was essentially a contingent Funding Agreement between the Bank and the Trustee. Under the Funding Agreement, the Bank agreed to advance funds to pay a claim relating to the furniture, fixtures, and equipment leases between Miami Center Joint Venture ("MCJV") and debtor Miami Center Limited Partnership (the "FF&E Lease Claim"), if certain conditions occurred. In consideration for the Bank's advance, the Trustee agreed to issue to the Bank the Trustee's Certificate to evidence and secure repayment of the advance. This Court subsequently entered a final judgment in favor of MCJV on the FF&E Lease Claim and authorized the Trustee to issue the Trustee's Certificate to the Bank. The Plan required the Trustee to acquire the furniture, fixtures, and equipment in order to sell the Miami Center Protect, so the Bank paid an obligation of the Trust when the Bank paid the FF&E Lease Claim.

22. The Discharged Debtors, represented by A&P, filed an appeal from that Order. The Trustee and the United States of America also appealed the Order. The Trustee's appeal was limited, initially, to only the amount of the Trustee's Certificate. The Trustee changed his position to oppose the Trustee's Certificate, because during the appeal the tax decision was entered, and the tax claims had priority over the payments to be made under the Trustee's Certificate. The District Court vacated the issuance of the Trustee's Certificate and remanded for reconsideration of certain factual issues: (i) the amount of the certificate, and (ii) its priority in light of the Supreme Court's decision in the Tax Case (which imposed upon the Trustee the burden of filing returns and paying federal taxes).

CONCLUSIONS OF LAW

23. A&P sets forth four distinct legal bases to justify payment of compensation and reimbursement from the Liquidating Trust, rather than by the Discharged Debtors in accordance with the terms of the Retainer Letter. The four bases are: (i) the post-confirmation fees are an administrative expense under the Bankruptcy Code; (ii) the fees are contemplated under the Plan; (iii) the fees are required to be paid under the common law of trusts; and (iv) the fees are required to be paid by the equitable principle of "fundamental fairness." Application, at ¶¶ 27-34.

A&P's Fees Are Not Permitted As An Administrative Expense Under The Bankruptcy Code

24. Allowed administrative expenses under § 503(b)(2) of the Bankruptcy Code include payment of compensation and reimbursement of costs awarded under section 330(a). 11 U.S.C. § 330(a). Section 330(a) of the Bankruptcy Code, provides that, "the court may award . . . to the debtor's attorney . . . reasonable compensation for actual, necessary services rendered." To be allowed under § 330, legal services must "benefit" the estate, not merely the debtor personally. *In re Watervliet Paper Co.*, 109 B.R. 733, 735 (Bankr. W.D. Mich. 1989)(stating that although debtor had a right to appeal, "[t]hat right, however, does not require the estate to bear the cost when it has not reaped a concomitant benefit. . . . It is not the right to appeal to which the U.S. Trustee objects, but rather to the Debtor's estate bearing the cost"); *In re Southern Commodity Corp.*, 85 B.R. 892 (Bankr. S.D. Fla.

1988)(services by debtor's attorney must benefit the estate to be compensable); *Matter of Ryan*, 82 B.R. 929 (N.D. Ill. 1987) (debtor's estate not benefited where attorney represented debtor in nondischargeability suits); *Matter of Zweig*, 35 B.R. 37, 38 (Bankr. N.D. Ga. 1983) (denying fee application where services benefited debtor personally, rather than estate); *In re Rosen*, 25 B.R. 81 (Bankr. D.S.C. 1982) (same).

25. For example, in *In re Sandra Cotton, Inc.*, 91 B.R. 657, 659 (W.D.N.Y. 1988), the District Court upheld the Bankruptcy Court's decision denying the fee application of the debtor's counsel because the "services were found not to benefit the estate." *Id.* The District Court noted that the services consisted primarily of pursuing certain appeals which did not benefit the estate. *Id.* In determining the nature of services which benefit the estate, the District Court stated:

> Traditional services performed by a debtor's attorneys which aid in the estate's administration and are expended for its benefit are, for example, bringing the case into court, preparing the necessary schedules and assisting the debtor in reporting its liabilities and assets for administration.

Id. (citing *J.V. Knitting Servs., Inc.*, 22 B.R. 543 (Bankr. S.D. Fla. 1982)); *see also In re Saunders*, 124 B.R. 234 (defining "benefit" to estate as services that (i) obtain more assets on behalf of estate to pay creditors, (ii) reduce the amount of claims against the estate, (iii) recover preferences at cost efficient rates, or (iv) restructure the debt of estate).

26. In *In re Sandra Cotton, Inc.*, the District Court concluded by noting that even if the debtor's attorney

efforts were successful, the services were noncompensable, "if his efforts, in fact, obstructed or impeded the administration of the estate." *Id.; see also In re Latham,* 131 B.R. 238, 239 (Bankr. S.D. Fla. 1991) ("To allow a debtor to dissipate the estate by paying attorney fees for services of no benefit to the estate is contrary to the concept of equitable distribution of the estate."); *In re Maller Restaurant Corp.,* 57 B.R. 72, 74 (Bankr. E.D.N.Y. 1985) (denying compensation for legal services where the "administration of the estate came to a conclusion for all practical purposes well before" the services were provided). As the Bankruptcy Court noted in *In re Marker,* "Involuntary clients, the creditors of the estate, may not be forced to accept and pay for something not requested and which is uncertain as to any beneficial effect upon the creditors' interests." *In re Marker,* 100 B.R. 569, 571 (Bankr. N.D. Ala. 1989).

The Trustee's Certificate Case

27. As to the Trustee's Certificate Case, the Discharged Debtor, represented by A&P, merely duplicated the efforts of the United States which sought to prevent the issuance of the Trustee's Certificate. The Discharged Debtors also interfered with the Trustee's administration of the Liquidating Trust. The interests of the Liquidating Trust were adequately represented by the Trustee and his counsel. The services provided by A&P were solely for the benefit of the Discharged Debtors. Because the Trustee and his counsel were adequately representing the interests of the Liquidating Trust in obtaining a stay of the issuance of the Trustee's Certificate while the tax issues were resolved, the services provided by A&P were

duplicative and unnecessary, and therefore are disallowed in their entirety.

The Mootness Case

28. This Court concludes that the services provided by A&P in the Mootness Case did not benefit the Trust within the meaning of § 330 of the Bankruptcy Code. Although not determinative of the issue, the fact that A&P's efforts on behalf of the Discharged Debtors were unsuccessful is important in considering whether a benefit was conferred on the Trust.

29. A&P incurred $64,468.75 in fees and $5,838.59 in costs in researching, drafting, finalizing, and filing a petition for writ of certiorari and a reply brief in support of the petition. The petition was denied, no benefit accrued to the estates, and payment from the Liquidating Trust of the fees and expenses, which have already been paid in part by the Discharged Debtors, should likewise be denied.

The Tax Case

30. As to the Tax Case, A&P's services provided no benefit to the Liquidating Trust, the creditors, or the Debtors' estates, the Court having found the "benefit" accrued only to the Discharged Debtors, who were otherwise personally responsible for the taxes. The plain meaning of benefit is, "Advantage; profit . . . gain; interest."something that promotes well-being". *Black's Law Dictionary* 143 (5th ed. 1979). Providing services to Party A that results in imposing on Party B a burden to file tax

returns and pay taxes, especially where three different Federal Courts had already held that Party B was not so obligated, is hardly promoting Party B's "interest". Conceptually, A&P has lifted the tax burden from the shoulders of the Discharged Debtors and placed it on the shoulders of the Liquidating Trustee, then demanded payment from the Liquidating Trustee for the "benefit" conferred. To award fees to A&P under these circumstances violates the plain meaning of the word "benefit", and thus, the underlying purpose of § 330 of the Bankruptcy Code which requires that a "benefit" accrue to the bankruptcy estate from the services rendered by a professional before that professional may be awarded fees.

31. In fact, the Retainer Letter signed by Gould solely on behalf of the Discharged Debtors expressly provides that A&P would represent the Discharged Debtors in the Tax Case. Prior to filing the Application, neither Gould nor A&P ever informed the Trustee or this Court that A&P would seek to have its fees and costs paid from the Liquidating Trust for its representation of the Discharged Debtors. As A&P and Gould agreed in the Retainer Letter, the Discharged Debtors rather than the Liquidating Trust are the parties responsible for payment of A&P's fees and costs.

32. Accordingly, this Court concludes that the post-confirmation services rendered by A&P to the Discharged Debtors are not allowable as an administrative expense under the Bankruptcy Code because the services neither benefited the Debtors' estates, the Liquidating Trust, the administration of the Liquidating Trust, nor the creditors relying on the Liquidating Trust for payment of their claims.

The Services Provided By A&P
Are Not Compensable Order The Plan

33. The services provided by A&P were neither contemplated in the Plan nor necessary for its consummation. Instead, the services performed by A&P were expressly prohibited by the Plan, which restrained the Discharged Debtors from such interference with the Trust and the duties of the Liquidating Trustee in managing the properties of the Trust. A&P's request for payment of these fees and costs from the Liquidating Trust is therefore disallowed. *Chase Manhattan Bank, N.A. v. Sultan Corp. (In re Sultan Corp.)*, 81 B.R. 599, 602 (Bankr. 9th Cir. 1987) (Postconfirmation legal services are only considered "necessary" under § 330(a) if the legal services both (i) aid in consummation of the confirmed plan and (ii) are expressly provided for in the confirmed plan.); *In re Hays Builders, Inc.*, 99 B.R. 848, 850 (Bankr. W.D. Tenn. 1989) (same).

34. Article VIII of the Plan limits the continuing duties and obligations of the Debtors after the Effective Date. The Debtors were limited to taking only actions necessary: (i) to carry out the provisions of the Plan; (ii) to comply with reasonable requests of the Trustee and the Bank; (iii) to effectuate the sale of the property; and (iv) to promptly implement and effectuate the distribution to the creditors of the estates.

35. Article V(3)(o) of the Plan, moreover, vests exclusive authority in the Trustee to employ professionals "as may be deemed necessary, at such compensation as the Trustee may deem reasonable." There is no provision in the Plan that allows the Discharged Debtors to retain

professionals to represent their own interests or to compensate such professionals from the assets of the Liquidating Trust. Because this Court's Order confirming the Plan has not been revoked despite the Discharged Debtors' attempts, the provisions of the Plan govern payment to professionals from the assets of the Liquidating Trust. Pursuant the express provisions of the Plan, the Trustee has employed professionals who have been compensated from the assets of the Liquidating Trust. Awarding fees and costs to A&P would double the administrative burden on the Trust of the cost of legal services, in direct contravention of the Plan.

36. Furthermore, paragraph 4 of Article V of the Plan expressly prohibits the Discharged Debtors from interference with the Trustee in the discharge of his duties:

> In no case shall any party dealing with the Trustee in any manner whatsoever . . . be obligated to see that the provisions of this Plan or terms of the Trust have been complied with, or be obligated or privileged to inquire into any other limitation or restriction of the power or authority of the Trustee to act, or to inquire into any other limitation or restriction of the power and authority of the Trustee . . . the power of the Trustee to act or otherwise deal with said properties shall be absolute.

Because the services provided by A&P directly contravened rather than promoted the provisions of the Plan, the services are not compensable under either the provisions of the Plan or §§ 330(a) and 503(b) of the Bankruptcy Code. Therefore, the Court denies in its entirety the request for payment from the Liquidating Trust of the

fees and costs incurred by the Discharged Debtors in their retention of A&P.

A&P's Services Are Not Compensable Under Trust Law

37. Florida trust law, like the Bankruptcy Code, requires that services rendered by professionals benefit the trust estate from which such compensation is to be awarded. *Feldheim v. Scott*, 579 So.2d 291, 292 (Fla. 3d DCA 1991) (reversing trial court's decision to award fees without first determining whether estate was benefited by services of counsel); *In re Estate of Simon*, 549 So.2d 210, 213 (Fla. 3d DCA 1989) ("[I]f the services tend to break down, subtract from or dissipate the estate [the attorney] cannot be compensated from it.") (quoting *In re Gleason's Estate*, 74 So.2d 360, 362 (Fla. 1954)); *Ball v. Mills*, 376 So.2d 1174, 1179 (Fla. 1st DCA 1979), *review denied*, 388 So.2d 1116 (Fla. 1980) (requirements of good faith, necessity, and benefit to the trust are to protect the trust from the destructive effects of selfishly motivated litigation). Thus, under the common law of trusts, a trust beneficiary, suing to require the trustee to perform his legal duty, may not recover attorneys' fees without first showing a benefit to the trust estate.

38. The Florida Third District Court of Appeal cautioned that courts should, "exercise great care in granting an allowance of attorney's fees in actions precipitated by [someone other] than the personal representative." *In re Estate of Simon*, 549 So.2d at 213 (quoting *In re Estate of Farris*, 113 So.2d 721, 722 (Fla. 3d DCA)), *review denied*,

116 So.2d 775 (Fla. 1959). Otherwise, litigation is encouraged at the expense of the trust estate. *Id.*

39. The two Florida cases cited by A&P are either consistent with applicable state law that only legal services that benefit the estate are compensable from the estate or otherwise readily distinguishable. In *Palmer v. Horton,* 469 So.2d 903, 904-05 (Fla. 3d DCA 1985), the court found benefit to the estate where the legal services forced the trustee to disgorge a "significant personal gain" that had been earned at the estate's expense. In addition, *Weinstein v. Nash (In re Estate of Weinstein),* 339 So.2d 700, 701 (Fla. 3d DCA 1976), is readily distinguishable because the *Weinstein* court awarded attorneys' fees pursuant to Florida Statute § 733.106 (Florida Probate Code) that expressly provides for attorneys' fees where a person in good faith offers a will for probate, even if that will is subsequently rejected in a will contest.

40. The decisions of state courts other than Florida cited by A&P are in accord. *See, e.g., Rogerson v. Wheeling Dollar Savs. & Trust Co.,* 222 S.E.2d 816, 822 (W. Va. 1976) (allowing compensation for legal services that, "benefited all members of the class of beneficiaries provided for in the will"); *Clarke v. Clarke,* 19 So.2d 526, 529 (Ala. 1944) (allowing compensation where legal services rendered, "resulted in the construction of the will"); *Matter of the Trust Known as Great Northern Iron Ore Properties,* 311 N.W.2d 488, 492 (Minn. 1981) (allowing compensation for legal services if, "an adjudication . . . is essential to a proper administration of the trust, and if . . . the litigation is conducted in good faith for the primary benefit of the trust as a whole").

41. The conclusion that the services provided by A&P did not benefit the Trust under applicable bankruptcy law is equally applicable under the Florida common law of trusts. Consequently, this Court must deny in its entirety the request for payment from the Liquidating Trust of fees and costs incurred by the Discharged Debtors in the retention of A&P.

Compensation Is Prohibited By The Doctrine Of "Law Of The Case"

42. The fees requested in the Fee Application are barred by the "law of the case" doctrine. On March 12, 1990, Bankruptcy Judge Weaver entered an Order Denying Application of Williams & Connolly for Allowance of Compensation and Reimbursement of Expenses (the "Order"). In the Order, this Court denied the fee application of Williams & Connolly ("W&C"), the Discharged Debtors' former counsel, on the grounds that the legal services performed by W&C on behalf of the Discharged Debtors (i) did not assist in consummating the confirmed plan or in fulfilling its directives; (ii) did not benefit the Liquidating Trust or the creditors; and (iii) were not authorized in the Plan. *See* Order, pp.3-5. Thus, A&P was either actually or constructively aware, based on this Order in the record, that it could not recover compensation from the Trust for services rendered for the benefit of the Discharged Debtors.

43. The law of the case doctrine serves to promote judicial consistency and economy. *See United States v. Feldman*, 825 F.2d 124, 130 (7th Cir., 1987). Under the law of the case doctrine, a prior ruling by the same court is

followed absent exceptional circumstances, such as a change in the controlling law, the availability of new evidence, or the need to prevent a clear error. *Shimer v. Fugazy (In re Fugazy, Inc.)*. 159 B.R. 432, 437 (Bankr. S.D.N.Y. 1993) (citing *Doe v. New York City Dep't of Social Servs.*, 709 F.2d 782, 789 (2d Cir. 1983)). The law of the case doctrine applies to issues that are decided either expressly or by necessary implication. *Id.* at 438. A decision awarding or denying attorney's fees is subject to the law of the case doctrine. *See Nelson & Small, Inc. v. Fraser (In re Fraser)*, ___ B.R. ___, 1993 WL 521239, at *1 (Bankr. D. Me. Nov. 23, 1993). Generally, as here, only "compelling reasons" justify not following a prior ruling in the same case by the same court. *Grand Traverse Dev. Co. Ltd. Partnership v. Board of Trustees (In re Grand Traverse Dev. Co. Ltd. Partnership)*, 150 B.R. 176, 185 (Bankr. W.D. Mich. 1993).

44. The law of the case doctrine is applicable here. First, A&P is merely a successor to W&C. Second, A&P has provided services in pursuit of the same or similar appeals as W&C. Because this Court previously determined that such services benefited solely the Discharged Debtors, rather than the Liquidating Trust and the creditors relying on it, the law of the case doctrine mandates denying the fees requested in the Application filed by A&P. There has been neither a change in the controlling law, nor new evidence presented, nor the need otherwise to prevent a clear error to justify a departure from the previous decision of this Court.

EVEN IF ALLOWABLE, FEES AND COSTS SHOULD BE REDUCED TO COMPLY WITH APPLICABLE LAW AND RULES

45. Recognizing that the Orders of this Court are subject to appellate review, this Court observes that even if it had determined the fees and costs requested in the Application were allowable, it would have substantially reduced them in amount for the following reasons.

46. On October 22, 1992, the United States Bankruptcy Court entered Administrative Order 92-7 (the "Administrative Order"), which approved and adopted the "Guidelines for Fees and Costs for Professionals" (the "Guidelines") and set forth detailed requirements for applications for professional fee awards filed on or after January 1, 1993.[3]

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[3] The Guidelines do apply to the Application. First, the Guidelines are a codification of existing case law regarding applications for compensation under the Bankruptcy Code. Second, the preamble provided that the Guidelines "apply in all bankruptcy cases" to "each interim and final application for professional fees." Third, the purpose of the Guidelines is to allow the Court to determine whether professional fees are "reasonable and necessary" as required by § 330 of the Bankruptcy Code. Because the Guidelines were drafted and adopted to assist the Bankruptcy Court in fulfilling its responsibilities under § 330, which is applicable to attorneys for debtors among others, the Guidelines are applicable to the Application. To the extent a professional seeks compensation from an estate, § 330 and local rules, including the Guidelines, enacted in furtherance of § 330 pertain to the Court's review and allowance of such application.

47. In addition to the Guidelines, under 11 U.S.C. § 330, a court may only award compensation and reimbursement for "reasonable" services that are "actual" and "necessary." Section 330, therefore, imposes upon the Bankruptcy Court "the unpleasant task of acting as the sharp-eyed controller." *In re Ginji Corp.*, 117 B.R. 983, 988 (Bankr. D. Nev. 1990). This discretion is not to be lightly exercised because the client may have little concern over the amount of fees paid from assets that are, in any event, to be distributed to others. *Id.* at 989.

48. The Application departs from the Guidelines by seeking compensation for services that are either inadequately documented or not compensable under either the Guidelines or § 330 of the Bankruptcy Code.

The Fees And Costs Requested

49. A&P seeks compensation for services rendered by professionals, paraprofessionals, and secretarial staff in the amounts of $670,535.00, $36,218.75, and $35,562.50, respectively, for a total of $742,316.25. Application, at Ex. 3 (calculated by adding annual total for years 1990, 1991, and 1993). In addition, A&P seeks reimbursement of costs in the reduced amount of $97,309.79, for a total request of $839,626.04.

Improper Recording Of Quarter-Hour Increments

50. A&P recorded time in quarter-hour minimum increments, rather than in tenths of an hour. Application, at ¶ 54. The majority of the recorded time of the A&P

professionals are in entries of one-half hour or one hour. Application, at Ex. 6.

51. The Guidelines provide that, "[e]ach professional and paraprofessional must record time in increments of tenths of an hour." Guidelines, at ¶ C.1. One may not deviate from the Guidelines, regardless of circumstances, "without prior Order of the presiding judge." Guidelines, at Preamble. A&P presented no evidence that it or the Discharged Debtors attempted to obtain such an Order before seeking payment of fees and costs from the Liquidating Trust that were recorded in quarter-hour minimum increments. That the Guidelines were adopted after the services were rendered and recorded by A&P is not curative because the case law that preceded the Guidelines established the rule against recording time in quarter-hour increments. *See Matter of Bilgutay,* 108 B.R. 333 (Bankr. M.D. Fla. 1989). Accordingly, the fees requested by A&P should be reduced by not less than five (5%) percent, or $37,115.81.

Inadequate Time Descriptions

52. A&P's professional and paraprofessionals failed to adequately describe the services rendered. Narrative descriptions of the services rendered must adequately set forth the, "participants, . . . scope, . . . and purpose of the activity that is reasonable in the circumstances." Guidelines, at ¶ C.2.

53. The Application is replete with entries succinctly described as "conference with [attorney]". For example, on January 29, 1991, three A&P attorneys attended a meeting in Washington D.C. with officials

from the IRS and the United States Justice Department. A&P fails to justify the need for all three A&P attorneys to attend the meeting with the government officials.

54. Interoffice conferences between professionals, while permissible if fully described, create a potential for overbilling and difficulty in measuring what, if any, benefit accrued to the bankruptcy estate. *In re Citrone Dev. Corp.*, 106 B.R. 359, 362 (Bankr. S.D.N.Y. 1989); *In re Microwave Products, Inc.*, 102 B.R. 661, 665 (Bankr. W.D. Tenn. 1989); *In re Farwell*, 77 B.R. 198, 201 (N.D. Ill. 1987). Some bankruptcy courts, recognizing the problems inherent in interoffice conferences, award no compensation for conference time. *In re Peoples Sav. & Inv., Inc.*, 103 B.R. 264, 272 (Bankr. E.D. Okla. 1989); *In re American Int'l Airways, Inc.*, 69 B.R. 396, 400 (Bankr. E.D. Pa. 1987). If interoffice conference time is allowed, the purpose of and results obtained must be set forth in sufficient detail for the Court to determine the benefit of the services. *In re Wildman*, 72 B.R. 700, 716 (Bankr. N.D. Ill. 1987) (finding "legal research" or "conference with" inadequate description); *In re Ginji Corp.*, 117 B.R. at 993 (same).

55. Moreover the Application contains insufficient descriptive detail to justify allowance of such an inordinate number of interoffice conferences. The total fees requested by A&P should be reduced for the overbilling caused by the duplication of effort by not less than twenty (20%) percent, or $148,463.25.

Clerical Tasks Performed
By Professional Or Paraprofessionals

56. A&P seeks compensation for clerical or secretarial tasks performed by professionals and paraprofessionals that are not compensable under the Guidelines or, if so, are only compensable at a reduced rate to reflect the level of skill required to adequately perform the task.

57. This Court will either not allow or allow only at a reduced rate compensation for professionals or paraprofessionals rendering clerical services such as organizing files, copying documents, checking the docket, updating files, checking court dates, and delivering papers. *In re Bicoastal Corp.*, 121 B.R. 653, 655 (Bankr. M.D. Fla. 1990); *In re Ginji Corp.*, 117 B.R. at 994. Accordingly, the total fees requested by A&P should be reduced by not less than ten 10% percent, or $74,231.63.

Case Management Attorney

58. A&P seeks compensation of $18,310, by the Court's calculation, for services rendered by a "case management" attorney. Application, at Ex. 3. A&P describes a case management attorney as a "managing clerk." The descriptions in the time entries attest to the clerical nature of the services rendered by the "case management" attorney. *See generally* Application, at Ex. 6. The fees of $18,310 requested by A&P for services rendered by the management attorney should be reduced by not less than fifty (50%) percent, or $9,155.

Secretarial And Clerical Services
Are Not Compensable

59. A&P seeks $35,562.50 in compensation for clerical staff, including secretaries, word processors, and librarians. A&P presented evidence to show that clients were offered a choice of rates. Under the first method, A&P charged a reduced rate for professional and paraprofessional services ($10 per hour less in 1990; $15 per hour less in 1991 and 1992), but also charged for secretarial and clerical expenses. Under the second method, A&P billed at a higher rate for professional and paraprofessional services, but did not bill for secretarial and clerical expenses. The Debtors elected the first method or the reduced rate method.

60. The Guidelines prohibit reimbursement for clerical or secretarial services, Guidelines, at ¶ D.2(k), in conformity with § 330 of the Bankruptcy Code. *In re Bicoastal Corp.*, 121 B.R. at 655; *In re Ginji Corp.*, 117 B.R. at 990; *In re Thacker*, 48 B.R. 161, 164 (Bankr. N.D. Ill. 1985).

61. Clerical and secretarial expenses are not reimbursable because they "are not legal services rendered by an attorney" and "are subsumed in the hourly rate of the attorney." *In re Bicoastal Corp.*, 121 B.R. at 655. Particularly when the hourly rates of the partners and associates are at the high end of the spectrum, as is the case here, courts deem the clerical and secretarial expenses to be subsumed in the hourly rates. *In re Ginji Corp.*, 117 B.R. at 990.

62. A&P's request of $35,562.50 for clerical services, although cloaked under the guise of billing options, is a thinly veiled effort to make reimbursable that which is

not reimbursable. A&P presented evidence to show that but for the Discharged Debtors' election of the reduced-rate method, the total compensation requested would have been higher by $11,500. Supplement, at ¶ 2. The fact remains, however, that the alleged "reduced-rates" for the attorneys remained at the high end of the spectrum of what firms of comparable quality charge. In order to receive reimbursement for secretarial and clerical services, under the dual charging system adopted by A&P, the applicant must submit sufficient evidence to show that its "reduced-rate" fee is in fact "reduced," at least to the same level charged other A&P clients and by other firms of comparable quality. To allow otherwise permits a law firm to bill at the high end of the spectrum and still collect additional fees for secretarial and clerical services.

63. Because A&P's hourly rates are at the high end of the spectrum, even without including secretarial or clerical expenses, this Court would disallow in its entirety the compensation requested for secretarial or clerical expenses of $35,562.50.

64. Even if the secretarial or clerical expenses of $35,562.50 were properly reimbursable under the Guidelines and the Bankruptcy Code, the descriptions provided by A&P's secretarial and clerical timekeepers are inadequate. Courts must deny compensation when the description of the services rendered does not allow for an objective determination of whether the services were reasonable and necessary. *In re Bicoastal Corp,*. 121 B.R. at 655. For example, A&P requests compensation for, "Word-Processing-Secretarial" and "Word-Processing-Secretarial [name of attorney]." Application, at Ex. 6.

65. A careful review of certain clerical entries reveals that A&P also seeks compensation for overhead expenses. For example, A&P seeks compensation for, "Word Processing Computer Time for the preceding week." Application, at Ex. 6 (December 21, 1990 Invoice, at p.6; March 22, 1991 Invoice, at p.7; *passim*). Whether "computer time" is ever capable of earning "compensation" is a question for philosophers, and this Court limits its ruling to simply prohibiting "compensation" for obvious "overhead expense", especially when the exact nature of that "expense" is not described with precision. Because the secretarial or clerical services are described in insufficient detail, the Application fails to enable the Court to determine what, if any, benefit the services were to the Liquidating Trust, and the fees requested for these services in the amount of $35,562.50 are disallowed on this ground as well.

Duplicating & Telecopy

66. A&P seeks reimbursement of $21,526.95 for duplicating and telecopy costs. This represents gross disbursements of $28,942.25 for duplicating and $8,324.00 for telecopy costs, adjusted to reflect a $15,739.30 reduction necessary to comply with the per page limits contained in the Guidelines (15¢ and $1.00 per page for duplicating and telecopy, respectively). In addition, A&P engaged outside printing services for $20,017.05 to print the petitions for writs of certiorari in the Tax Case and Mootness Case, the reply briefs on the petitions, and the opening and reply brief on the merits in the Tax Case. Supplement, at ¶ 3.

67. The Court calculates, as the number is not stated in the Application (in contravention of the Guidelines) that A&P made approximately 115,773 copies ($28,943.25 unadjusted duplicating costs divided by A&P's customary charge of 25¢ per page). This Court notes that 115,773 copies represents 20 miles of paper laid out end to end. This is patently excessive, especially given the additional $20,017.05 paid to outside printers. The Application does not contain an explanation that would enlighten this Court as to any extraordinary circumstances that would justify the volume of duplication for which A&P seeks reimbursement. A&P should not be awarded reimbursement for these excessive duplicating and telecopy charges. Accordingly, the reimbursement of $21,526.95 for duplicating costs requested by A&P should be reduced by not less than fifty (50%) percent, or $10,763.48.

Couriers

68. A&P seeks reimbursement of $6,703.90 for disbursements to "couriers." Response, at Amended Ex. 4. The average cost of each delivery was "about fifteen, eighteen dollars apiece." Assuming an average cost of $16.50 ($15 plus $18 divided by 2), couriers delivered approximately 406 documents for A&P ($6,703.90 divided by $16.50).

69. Given that A&P represented the Discharged Debtors for 380 days (assuming a five-day work week, no holidays, for the 19 month period), couriers delivered documents for A&P in excess of once each working day. This excessive use of couriers may have been caused by

A&P's decision to staff the engagement with professionals from both its Washington D.C. and New York offices.

70. Reimbursement is allowed for "reasonably incurred" courier charges, but such "[c]harges should be minimized whenever possible." Guidelines, at ¶ D.2(e). In fact, couriers "should be used only when first-class mail is impracticable." Guidelines, at ¶ D.2(e).

71. A&P fails to reflect what, if any, effort was made to "minimize" the courier costs. In fact, A&P did not present sufficient evidence to show that the $6,703.90 was necessary, reasonable, or provided a commensurate benefit to the Trust or creditors relying thereupon. Absent such evidence in the Application or in the record, as to the nature and purpose of such extraordinary use of couriers, the reimbursement of $6,703.90 for courier costs should be reduced by not less than seventy-five (75%) percent, or $5,027.93.

Meals

72. A&P seeks reimbursement of $1,826.97 for meals.

73. Meals, including staff meals, incurred within 50 miles of the applicant's office are not reimbursable. Guidelines, at ¶ D.2(j). The Application does not provide sufficient description regarding where the meals were devoured. Because the applicant has the burden of proof, the Application with respect to seeking compensation for meals is insufficient, and the Court should deny in its

entirety A&P's request of $1,826.97 for meal reimbursements.

Document Retrieval

74. A&P seeks reimbursement of $8,070.78 for "document retrieval".

75. A&P used a document retrieval service to "obtain papers from government agencies." A&P also "use[d] the copies" received from the document retrieval service. Having made 115,773 in-house copies, incurred $20,215.61 in outside printing charges, and obtained the likely volumes of documents that computer research produced, A&P still found it "necessary" to incur document retrieval charges of $8,070.78. In the aggregate, A&P incurred costs, either directly or indirectly, of $75,426.01 related to document production ($28,943.25 minus $15,739.30, plus $20,215.61, plus $25,611.67, plus $8,324.00, plus $8,070.78; *see* Response, at Amended Ex. 4).

76. "Excessive charges" are not reimbursable. Guidelines, at ¶ D.1(a). A&P bears the burden of proof that the very substantial charges relating to document duplication and retrieval are not "excessive". A&P has failed, however, to show that $8,070.78 in document retrieval charges were necessary and reasonable, given the other substantial costs incurred by A&P for similar services. Absent evidence that the document retrieval charges are not excessive, the $8,070.78 in reimbursement sought by A&P should be reduced by not less than fifty (50%) percent, or $4,035.39.

Transportation & Travel

77. A&P seeks reimbursement of $7,492.08 for transportation and travel.

78. Travel expenses incurred within 50 miles of the applicant's office are not reimbursable. Guidelines, at ¶ D.2(j). Travel expenses incurred more than 50 miles from the applicant's office are reimbursable, only if the Application contains the (i) date of travel, (ii) purpose of travel, (iii) cost of each trip, and (iv) name of the person traveling. Guidelines, at ¶ D.2(j). The Application does not provide sufficient description regarding where the travel occurred, and the Court cannot therefore ascertain whether it was within the 50 mile requirement for reimbursement. Because the applicant has the burden of proof, the Application with respect to seeking compensation for travel is insufficient, and the reimbursement of $7,492.08 requested for travel should be denied in its entirety.

79. Even if the fees and costs were to be allowed, something this Court has not seen fit to do given the lack of benefit and results obtained, the balance remaining after the foregoing suggested deductions of $333,674.04 would have to be prorated among the three matters as to which A&P provided representation and allowed as to each, in whole or in part, to whatever extent an entitlement might be determined.

80. A separate Order of even date has been entered in conformity herewith.

DATED at Miami, Florida, this 9 day of March, 1994.

/s/ Paul G. Hyman, Jr.
Paul G. Hyman, Jr., Judge
United States
Bankruptcy Court

U.S. Department of Justice

United States Attorney
Southern District of Florida

99 N.E. 4 Street, Suite 800
Miami, Florida 33132-2111

March 17, 1994

(Filed March 21, 1994)

Certified Mail – Return Receipt Requested

Miguel J. Cortez, Clerk
United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N. W.
Atlanta, GA 30303

RE: Gould vs. Smith
Case No. 93-5042

Dear Mr. Cortez:

We are representing the United States in connection with the above-referenced matter. The United States, which is not a party, has been asked to assist in this case in the collection of a civil contempt fine imposed by the Honorable Stanley Marcus against Theodore Gould. Since the United States is not involved in the issues raised on appeal, we will not be filing a brief with the Court. The United States hereby withdraws its notice of appearance filed earlier in this matter; the United States requests that the undersigned Assistant United States Attorney remain on the mailing list so that we can monitor the appeal and

perform the duties required of us at the completion of the appeal. Your cooperation in this matter is appreciated.

Very truly yours,

KENDALL B. COFFEY
UNITED STATES ATTORNEY

By: /s/ Maureen Donlan
Maureen Donlan
Assistant U.S. Attorney
Tel. (305) 536-6830

cc: Theodore B. Gould
Herbert Stettin, Esquire

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

THEODORE B. GOULD, Appellant, vs. FRED STANTON SMITH, as Liquidating Trustee of the Miami Center Liquidating Trust, Appellee. In Re: HOLYWELL CORPORATION, et al., Debtors.	CASE NO. 89-2629-CIV-MARCUS UNITED STATES' MOTION TO DEPOSIT FUNDS IN COURT REGISTRY

The United States moves to have certain funds deposited in the Court Registry pending a final determination by the Eleventh Circuit Court of Appeals of Theodore B. Gould's appeal from this Court's Order of Final Judgment dated August 31, 1993. By Order dated August 31, 1993, this Court entered a Final Judgment in favor of the United States and against Theodore B. Gould in the amount of $1,331,000.00. The judgment was to bear interest at the rate prescribed by 28 U.S.C. § 1961(a). Theodore B. Gould's appeal of the Order of Final Judgment dated August 31, 1993 remains pending before the Eleventh Circuit Court of Appeals.

The United States Internal Revenue Service has determined that Theodore B. Gould is eligible to receive a reward in the amount of $84,000.00 for providing information to the Internal Revenue Service which resulted in the collection of a substantial tax liability. The Internal Revenue Service has not yet disbursed these funds to Theodore B. Gould.

The United States could now seek to execute on its judgment. However, pending the final determination by the Eleventh Circuit Court of Appeals, the United States requests that the reward in the amount of $84,000.00 from the Internal Revenue Service be deposited in the Court Registry.

Respectfully submitted,
KENDALL B. COFFEY
UNITED STATES ATTORNEY

By: /s/ Maureen Donlan
Maureen Donlan
Assistant U.S. Attorney
Federal Justice Building
99 N.E. 4th Street
Third Floor/Civil Division
Miami, Florida 33132-2111
Tel. No. (305) 536-6830
(Fla. Bar. No. 298034)

(Seal)

U.S. Department of Justice
United States Attorney
Southern District of Florida

99 N.E. 4 Street, Suite 800
Miami, Florida 33132-2111

January 5, 1995

VIA HAND DELIVERY

United States District Court
Southern District of Florida
301 North Miami Avenue
Room 150
Miami, Florida 33128

Attention: Aggie Reed

IN RE: Holywell Corporation, et al., Theodore B. Gould vs. Fred Stanton Smith
Case No. 89-2629-Civ-Marcus

Dear Ms. Reed:

Enclosed please find a copy of the Court's November 16, 1994 Order and a check in the amount of $84,516.82 payable to the Clerk of the U. S. District Court. Pursuant to the Court's Order, the enclosed check is to be placed in the Court Registry. If you have any questions or comments, please do not hesitate to contact me.

Very truly yours,
KENDALL B. COFFEY
UNITED STATES ATTORNEY

By: /s/ Maureen Donlan
Maureen Donlan
Assistant U.S. Attorney
Tel. (305) 536-6830

Enclosures
United States Treasury Check No.
3510 74344787 – $84,516.82
cc: Theodore B. Gould

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 89-2629-CIV-MARCUS

IN RE:
HOLYWELL CORPORATION, et al.,

THEODORE B. GOULD,

Appellant,

vs.

FRED STANTON SMITH, as Liquidating Trustee of the Miami Center Liquidating Trust and THE UNITED STATES OF AMERICA,

Appellees.

ORDER

(Filed Nov. 18, 1994)

THIS CAUSE came before the Court upon the Motion of the United States to Deposit Funds in Court Registry, filed October 25, 1994. The Court being fully advised in the premises and there being no objection, it is

ORDERED AND ADJUDGED that the Motion be and the same is hereby GRANTED. The $84,000.00 reward from the Internal Revenue Service to Theodore B. Gould shall be placed in the Court Registry.

DONE AND ORDERED at Miami, Florida, this 16th day of November, 1994.

/s/ Stanley Marcus
STANLEY MARCUS
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA